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MUSIC LICENSING PRACTICES OF PERFORMING RIGHTS SOCIETIES

HEARINGS

BEFORE THE

SUBCOMMITTEE ON INTELLECTUAL PROPERTY AND JUDICIAL ADMINISTRATION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

FEBRUARY 23 AND 24, 1994

Serial No. 63

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MUSIC LICENSING PRACTICES OF PERFORMING RIGHTS SOCIETIES

WEDNESDAY, FEBRUARY 23, 1994

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTELLECTUAL PROPERTY,
AND JUDICIAL ADMINISTRATION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2237, Rayburn House Office Building, Hon. William J. Hughes (chairman of the subcommittee) presiding.

Present: Representatives William J. Hughes, Don Edwards, Howard L. Berman, Jack Reed, Carlos J. Moorhead, Howard Coble, F. James Sensenbrenner, Jr., and Steven Schiff.

Also present: Hayden Gregory, counsel, William Patry, assistant counsel; Veronica Eligan, secretary; and Joseph Wolfe, minority counsel.

OPENING STATEMENT OF CHAIRMAN HUGHES

Mr. HUGHES. This oversight hearing before the House Committee on the Judiciary, Subcommittee on Intellectual Property and Judicial Administration will come to order.

Good morning, and welcome to this morning's hearing. The Chair has received a request to cover this hearing either in whole or in part by television broadcast, radio broadcast, still photography or by other similar methods. In accordance with committee rule 5(a) permission will be granted unless there is an objection. Is there an objection?

[No response.]

Mr. HUGHES. Hearing none, permission is granted.

This morning the subcommittee will begin 2 days of oversight hearings on music licensing practices of the performing rights societies, ASCAP, BMI, and SESAC. Tomorrow's hearing, also will begin at 10 a.m., and will be held in room 2226.

It has been 16 years since the last general revision of the Copyright Act became effective. There have been quite a number of changes in that period, both in the music industry and in the way music is used. The advent of digital delivery systems such as digital audio cable promises even more dramatic changes in the very near future.

These very developments alone justify oversight hearings into the licensing of music and whether the copyright law has kept pace. There are other reasons, however. Section 110(5) of the Copyright Act, sometimes called the small business exemption, has been

the subject of more litigation than any other limitation on a copyright owner's rights.

I imagine the performing rights societies, who are involved in every one of those cases, would agree that no consistent interpretation of section 110(5) has evolved. After 16 years, that is not very encouraging.

Part, perhaps most, of the fault for this lack of clarity lies at Congress' feet. There are a number of problems in section 110(5) which we will explore during the hearings. It may be that as a result of the testimony we will consider amendments to section 110(5) or relief similar to that proposed in H.R. 3288 introduced by our colleagues, Mr. Thomas and Mr. Pastor, or it may be that a more modest assertion of rights may be called for.

I do want to make it clear, though, that I believe there would appear to be problems with some of the practices that are the subject of these hearings.

The lack of clarity in section 110(5) and the nature of enforcement of copyright rights—pay up or we'll sue you—has led to claims that some licenses are inconsistent or questionable. We will hear a lot of testimony about the size of television sets, and licenses being required for high school choirs singing Christmas carols at malls, or music on hold, and even at funeral homes.

The continued utility of the section 110(5) exemption will be questioned. Does it adequately balance the rights of copyright owners to compensation for harm to their market against the reasonable practices of food and drink establishments of merely turning on a radio or television set for the incidental pleasure of their guests?

Issues will also be raised considering compliance with consent decrees, such as whether a meaningful per-program license is being offered, and whether users are timely provided a list of the society's repertoire in order to make an intelligent decision about whether or how to use particular music.

We will hear testimony from one of the societies, SESAC, about an innovative pilot program to track the actual use of music. It promises to be a very interesting hearing, and hopefully a very useful and productive one. I look forward to the testimony of the various witnesses.

I know that the acting ranking Republican will be along, and we will reserve the right for him to make or submit an opening statement.

The gentleman from Rhode Island.

Mr. REED. Thank you, Mr. Chairman. I want to thank you for holding this important hearing on music licensing, and I want to particularly welcome one of the witnesses we will be hearing from today, and that is John Deion who is not only my constituent, but my neighbor from Cranston, RI. Welcome, John, and we will have a chance later to hear your testimony.

H.R. 3288, which we touch on today, is an attempt to eliminate some of the ambiguity in the current exemption for public performances of copyrighted works. To the extent that this legislation will clarify and eliminate the arbitrary effects of the exemption, I believe that this will be a good way to ease the strain on small businesses while continuing to protect the rights of composers.

Once again, I am glad to be here, and I look forward to hearing and learning from the testimony of the witnesses. Thank you, Mr. Chairman, for your efforts today in this hearing.

Mr. HUGHES. Does the gentleman, the acting ranking Republican, have a statement to submit for the record?

Mr. COBLE. No statement, Mr. Chairman.

Mr. HUGHES. The gentleman from Wisconsin.

Mr. SENSENBRENNER. No statement, Mr. Chairman. Thank you.

Mr. HUGHES. We begin these hearings with testimony by our colleagues, Craig Thomas, Representative at Large for the State of Wyoming and Ed Pastor who represents the Second District of Arizona. They are the sponsors of H.R. 3288, the Public Accommodations Exception Act of 1993. I want to welcome you to the subcommittee's hearing today, Craig and Ed.

We have your statements, which, without objection, will be made part of the record in full. You may proceed as you see fit. Have you decided who would like to go first?

Mr. THOMAS. Ed has a markup, so I think he is going to go first.

STATEMENT OF HON. ED PASTOR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Mr. PASTOR. Thank you very much. Good morning.

Mr. Chairman and members of the subcommittee, in the last session of Congress, I joined my colleague, Representative Craig Thomas, to be the original cosponsor of H.R. 3288, the Public Accommodations Acceptance Act.

I urge the subcommittee to favorably report H.R. 3288 in this session of Congress. I believe it is a much needed change to our copyright laws especially as they relate to a provision passed by Congress in 1976.

Representatives of the retail hospitality in my State of Arizona and others around the country have discussed this issue with me. I believe it is time for Congress to amend the Copyright Act of 1976 to provide for a total exemption from licensing fees paid to performing rights societies for the radio and television equipment used in bars, restaurants, and other commercial establishments where food and drink are served provided—and this is the most important item in the bill, Mr. Chairman—the performance of this music is incidental to the main purpose of the establishment, and no direct charge is made to see or hear its transmission.

I have just read to you, Mr. Chairman, the language of H.R. 3288, which is very narrowly focused and defines the parameters that the licensing organization must follow in their interpretations of the copyright law regarding the size of television screens and the types of equipment that is commonly used in private homes.

There also appears to be, Mr. Chairman, a need to address this homestyle exemption in the copyright law in light of recent Federal cases in which the court has urged Congress to clarify the language in the statute. I refer specifically to the case of *Edison Brothers Stores* v. *Broadcast Music, Inc.*

In this case, Mr. Chairman, BMI sued two national retail chains over alleged copyright infringements related to the playing of radio music in their stores, and the Federal court held that these stores

do not violate the Federal copyright law by not paying royalties. A copy of this decision is attached to my statement.

Mr. Chairman, I urge the subcommittee to pass H.R. 3288 and seek its inclusion in the copyright law so that further confusion within the hospitality industry will be avoided.

Thank you, Mr. Chairman.

Mr. HUGHES. Thank you, Ed.

[The prepared statement of Mr. Pastor follows:]

PREPARED STATEMENT OF HON. ED PASTOR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Mr. Chairman and members of the subcommittee, in the last session of Congress, I joined with my colleague, Rep. Craig Thomas (R-WY), to be the original co-sponsor of H.R. 3288, the Public Accommodations Exceptions Act. I urge the subcommittee to favorably report H.R. 3288 in this session of Congress. I believe it is a much needed change to our copyright laws, especially as they relate to a provision passed by Congress in 1976.

Representatives of the retail hospitality establishments in my state of Arizona, and others around the country, have discussed this issue with me. I believe it is time for Congress to amend the Copyright Act of 1976 to provide for a total exemption from licensing fees paid to the performing rights societies for the radio and television equipment used in bars, restaurants and other commercial establishments where food and drink are served, provided and, this is most important, Mr. Chairman, the performance of this music is incidental to the main purpose of the establishment and no direct charge is made to see or hear its transmission. I have just read to you, Mr. Chairman, the language of H.R. 3288, which is very narrowly focused and defines the parameters that the licensing organizations must

follow in their interpretations of the copyright law regarding the size of television screens and what types of equipment is of a kind commonly used in private homes.

There also appears to be, Mr. Chairman, a need to address this homestyle exemption in the copyright law in light of recent federal cases, in which the Court has urged Congress to clarify the language in the statute. I refer specifically to the case of Edison Bros. Stores, Inc. v. Broadcast Music, Inc., 954 F.2d 1419 (8th Cir. 1992). In this case, Mr. Chairman, BMI sued two national retail chains over alleged copyright infringements relating to the playing of radio music in their stores, and the Federal Court held that these stores did not violate the federal copyright law by not paying royalties. A copy of this decision is attached to my statement.

Mr. Chairman, I urge the committee to pass H.R. 3288 and seek its inclusion in the copyright law, so that further confusion within the hospitality industry will be avoided.

EDISON BROTHERS STORES, INC., Appellee,

v.

BROADCAST MUSIC, INC., Appellant.

No. 91-2115.

United States Court of Appeals, Eighth Circuit.

Submitted Nov. 7, 1991.

Decided Jan. 13, 1992.

Assignee of public performance rights of copyrighted musical recordings brought action against retail clothing and shoe store chain alleging unlicensed broadcast. The United States District Court for the Eastern District of Missouri, 760 F.Supp. 767, John F. Nangle, Senior District Judge, found that chain's conduct came within "homestyle exemption" to copyright law. Assignee appealed. The Court of Appeals, Bowman, Circuit Judge, held that for purposes of determining whether establishment qualifies for homestyle exemption, appropriate focus is on radio equipment used in establishment, rather than total amount of equipment owned by store owner in various store locations, or total square footage of establishment, or owner's ability to pay for commercial background music service.

Affirmed.

1. Copyrights and Intellectual Property ⇐66

In determining whether commonly owned stores qualified for "homestyle exemption" to exclusive performance rights for music copyrights, appropriate focus was on radio equipment used in each individual store, rather than total amount of equipment owned by store owner in various store locations. 17 U.S.C.A. § 110(5).

See publication Words and Phrases for other judicial constructions and definitions.

2. Copyrights and Intellectual Property ⇐66

Common owner of chain of stores qualified for homestyle exemption to exclusive performance rights for music copyrights where radio equipment used in each individual store consisted of radio-only receiver connected to two portable box speakers placed within 15 feet of receiver. 17 U.S.C.A. § 110(5).

3. Copyrights and Intellectual Property ⇐66

For purposes of determining whether particular establishment qualifies for home-

style exemption to exclusive performance rights for music copyrights. size of establishment is irrelevant; under statute. question of whether establishment qualifies for exemption determined solely with reference to type of radio equipment used by establishment. 17 U.S.C.A. § 110(5).

4. Copyrights and Intellectual Property ⇐66

In determining whether particular establishment qualifies for homestyle exemption to exclusive performance rights for music copyrights, issue of whether establishment's owner is able to pay for commercial background music service is irrelevant; under statute dealing with homestyle exemption, determination as to whether establishment qualifies for exemption is made solely with reference to type of radio equipment used in that particular establishment. 17 U.S.C.A. § 110(5).

Johnathan Zavin, New York City, argued (Scott M. Martin and Judith Saffer, New York City, Jim J. Shoemake and Kurt S. Odenwald, St. Louis, Mo., on brief), for appellant.

Michael A. Kahn, San Francisco, Cal., argued (Katharine Livingston and J. Daniel Sharp, San Francisco, Cal., and Robert T. Haar, St. Louis, Mo., on brief), for appellee.

Before McMILLIAN, JOHN R. GIBSON and BOWMAN, Circuit Judges.

BOWMAN, Circuit Judge.

Broadcast Music, Inc. (BMI), appeals the District Court's[1] decision to grant summary judgment in favor of Edison Brothers Stores, Inc., in Edison's suit for a declaratory judgment that its stores qualify for an exemption from the vesting of exclusive rights of performance in the owners of copyrighted works. *See Edison Bros. Stores, Inc. v. Broadcast Music, Inc.*, 760 F.Supp. 767 (E.D.Mo.1991). We affirm.

The relevant facts are not in dispute. BMI is a performing rights organization that collectively licenses, as assignee of the rights of its copyright-holding clients (primarily publishers and songwriters), the public performance of such clients' copyrighted works.

Edison owns a chain of approximately 2500 retail clothing and shoe stores doing business as Chandlers, Jeans West, Fashion Conspiracy, Size 5-7-9 Shops, J. Riggins, Bakers, the Wild Pair, and others. Most of Edison's stores operate a single radio receiver with two attached shelf speakers to play radio broadcasts in the stores for the enjoyment of employees and customers. The equipment is simple and inexpensive. Edison has promulgated a radio usage policy and requires the adherence of these stores to the rules therein. The District Court summarized the policy as follows:

1. Only simple, low grade radio-only receivers are to be used.
2. Only two speakers may be attached to a radio receiver.
3. The speakers must be placed within 15 feet of the receiver.
4. Speakers that are built into the walls or ceilings must not be used. Only portable box speakers are allowed.
5. [Edison will a]dvise each store manager that they are not to use tapes, cassettes, or any other type of recording equipment in their stores. They are to play the radio only.

Edison Bros. Stores, 760 F.Supp. at 769-70, *quoted in* Brief of Appellee at 7. BMI has submitted no evidence that any of the Edison stores to which the radio usage policy applies have failed to comply with it.

Approximately 220 of Edison's stores have more sophisticated audio and video

1. The Honorable John F. Nangle, Senior United States District Judge for the Eastern District of Missouri.

2. In its complaint, Edison also claimed that BMI was equitably estopped from attempting to collect license fees because of the prior dealings of the parties. Complaint at ¶ 19, *reprinted in* Joint Appendix A-7, A-13. The District Court did not reach this issue. Edison asks this Court to remand for consideration of the estoppel issue should we reverse the decision of the District Court. Because we are affirming that decision, a remand is unnecessary.

systems or subscribe to commercial music services. Edison pays license fees to BMI or to commercial services licensed by BMI or other performing rights organizations for the music played in these stores. In recent years BMI approached Edison about licensing the remaining stores in its chain. Negotiations between the two parties evidently broke down, and Edison filed suit in District Court seeking declaratory relief. The court, agreeing with Edison's position, declared that the radio systems in use at Edison's unlicensed stores qualified for the so-called homestyle exemption to the exclusive performance rights that copyright owners enjoy under federal law. BMI appeals.

In reviewing on appeal a district court's decision to grant summary judgment, we are governed by the same standard that governed the court below. *McCuen v. Polk County, Iowa*, 893 F.2d 172, 173 (8th Cir.1990). We therefore will affirm the District Court unless we find there remain genuine issues of material fact, in which case a trial would be required, or that the District Court erred in deciding that Edison was entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). BMI and Edison both filed motions for summary judgment and thus apparently agree there are no disputed issues of material fact. Therefore we are left with a purely legal question involving interpretation of the Copyright Act.

I.

Under the Copyright Act, the owner of the copyright of a musical work has the exclusive right, among other rights, to perform the copyrighted work publicly. 17 U.S.C.A. § 106(4) (West Supp.1991). The Act, however, provides exemptions for certain performances. 17 U.S.C. § 110 (1988). Among the acts that are not "infringements of copyright" is the following:

> communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless—
>
> (A) a direct charge is made to see or hear the transmission; or
>
> (B) the transmission thus received is further transmitted to the public[.]

Id. § 110(5). The issue before the District Court, and now before us, is whether Edison's 2000-plus radio receivers, each with two attached speakers and each operated in a different store, qualify for this homestyle exemption. BMI insists that, for several reasons, the exemption is unavailable to Edison.

Clearly, each radio in an Edison store is a "single receiving apparatus" and is "communicat[ing] ... a transmission embodying a performance ... of a work by the public reception of the transmission." The receivers in the Edison stores are tuned to local radio stations and play anything and everything, including musical works, that the radio stations broadcast while the stores' receivers are on. No "direct charge is made to see or hear the transmission," and there is no contention that the broadcast is "further transmitted to the public" beyond the stores.

The sticking point for the parties, and the basis for BMI's first argument, is Edison's multiple locations, each employing a single receiver and two speakers in conformity with the company's radio usage policy. BMI argues that the statutory requirement that the transmission be received "on a single receiving apparatus of a kind commonly used in private homes" is not satisfied by this arrangement; although BMI concedes that an individual receiver and speaker set-up in one store may fit within the exemption, it takes the position that Edison lost section 110(5) protection as soon as it installed the second receiving apparatus in another of its stores. BMI contends that the statute requires that we consider the equipment of any one owner *in toto*, and not on a per-store basis, when we decide whether or not the exemption applies and find (as of course we would if we did as BMI suggests) that Edison is not in fact operating a "single receiving apparatus" within the meaning of the statute.

[1] We cannot accept BMI's interpretation of section 110(5), as it defies the plain language of the statute. Section 110(5) does not say that a person, company, or other entity must own or operate only a single receiver to qualify for the exemption: it refers to "the communication of a transmission embodying *a* performance ... of *a* work" (emphasis added). We think it obvious that the language refers to a single location. "The statute does not ask how many receiving apparatuses were used to receive a number of different works. The language of the statute thus strongly suggests that the proper analysis should be limited to the area where a single work is performed." *Broadcast Music, Inc. v. Claire's Boutiques, Inc.*, 949 F.2d 1482, 1490 (7th Cir.1991).[3] If we were to embrace BMI's argument and reach the result it suggests, the equipment used in any Edison store, including those stores that have more sophisticated equipment, would be attributable to each of the other stores owned by Edison for purposes of the Copyright Act. Such a result does not comport with the statutory language.

[2] We agree with the District Court "that it is not appropriate to focus on the number of stores involved, but rather on whether each store duplicates the requirements of the homestyle exception." *Edison Bros. Stores*, 760 F.Supp. at 770. There is no evidence in the record that any of Edison's unlicensed stores fail to meet the statutory criteria for entitlement to the section 110(5) exemption.

BMI claims that the legislative history of the exemption supports its multiple receiver argument. Our reading of the legislative history reveals nothing that convinces us that each store in a retail chain should not be considered for the homestyle exemption individually, as seems plain from the straightforward language of section 110(5). We certainly will not use the legislative history to which BMI directs our attention as a basis for reading into the statute limitations its language does not express. *See Union Bank v. Wolas*, — U.S. —, —, 112 S.Ct. 527, 530, 116 L.Ed.2d 514, 521 (1991) ("Given the clarity of the statutory text, respondent's burden of persuading us that Congress intended to create or to preserve a special rule [not expressed in the statutory language] is exceptionally heavy.").

II.

BMI also bases its next argument on the legislative history of the enactment. BMI is not asking us to use legislative history to assist in clarifying an ambiguous statute: we are being asked to use legislative history to rewrite the section 110(5) exemption to add new requirements.

[3] BMI contends that the physical size of Edison's stores removes the chain and its individual stores from the protection of the section 110(5) exemption.[4] In order to reach such a result, BMI would have us read into the exemption a requirement that total space in the stores must not exceed 1055 square feet, with the area open to the public not to exceed 620 square feet. Brief of Appellant at 9, 11. The basis for this argument is a Supreme Court decision in a copyright case antedating the enactment of section 110(5) and the Report of the House Judiciary Committee relating to that section.

In *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 95 S.Ct. 2040, 45 L.Ed.2d 84 (1975), the Supreme Court had before it the issue of whether the proprie-

3. In *Broadcast Music, Inc. v. Claire's Boutiques, Inc.*, 949 F.2d 1482 (7th Cir.1991), the Seventh Circuit considered some of the same issues now before us and reached a result consistent with our decision today.

4. Edison asserts that the record on the size of its stores is inadequate for BMI to sustain this claim factually, regardless of its legal viability. *See* Brief of Appellee at 35 & n. 13. BMI, on the other hand, claims that the record demonstrates the average square footage of Edison's unlicensed stores is 2268 square feet, with 800 to 1200 square feet open to the public. Reply Brief of Appellant at 18 n. 11. Clearly this is a disputed question of fact, but in view of our holding that a store's physical size is not a factor that requires consideration under the statute, it is irrelevant and does not require resolution in order for us to affirm the District Court's entry of summary judgment in favor of Edison.

tor of a food shop who installed and played a radio with four speakers on the premises of his business was required to pay licensing fees for the music thus provided for his patrons. The Court, holding that in so using a radio Aiken was not "performing" within the meaning of the Copyright Act, ruled that he was not. The House Report on the 1976 amendments to the Copyright Act suggests that the section 110(5) exemption was added to the Copyright Act in response to the Court's opinion in *Aiken*. H.R.Rep. No. 1476, 94th Cong., 2d Sess. 86–87 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5700–01. The Report indicates that the new exemption was intended to supersede the Court's holding in *Aiken* that the playing of a radio in a commercial establishment open to the public is not a "performance," and thus not an infringing act. At the same time, the Report suggests that on the facts of *Aiken* the Court's decision exempting Aiken from the payment of licensing fees was appropriate and deserving of codification.

The language from the Report upon which BMI focuses is this: "the Committee considers this fact situation [in *Aiken*] to represent the outer limit of the [homestyle] exemption, and believes that the line should be drawn at that point." *Id.* at 87, *reprinted in* 1976 U.S.C.C.A.N. at 5701. Even accepting *arguendo* the untenable proposition that we would give greater weight to what a House Committee "considers" than to the text the entire Congress enacts and the President signs, BMI neglects to point out that the "fact situation" described in the Report, which immediately precedes the above-quoted language, makes no mention of square footage: "Under the particular fact situation in the *Aiken* case, assuming a small commercial establishment and the use of a home receiver with four ordinary loudspeakers grouped within a relatively narrow circumference from the set, it is intended that the performances would be exempt under clause (5)." *Id.* Further, the "fact situation" as described in *Aiken* makes no mention of the square footage of Aiken's shop:

> The respondent George Aiken owns and operates a small fast-service food shop in downtown Pittsburgh, Pa., known as "George Aiken's Chicken." Some customers carry out the food they purchase, while others remain and eat at counters or booths. Usually the "carry-out" customers are in the restaurant for less than five minutes, and those who eat there seldom remain longer than 10 or 15 minutes.
>
> A radio with outlets to four speakers in the ceiling receives broadcasts of music and other normal radio programing at the restaurant. Aiken usually turns on the radio each morning at the start of business. Music, news, entertainment, and commercial advertising broadcast by radio stations are thus heard by Aiken, his employees, and his customers during the hours that the establishment is open for business.

Aiken, 422 U.S. at 152, 95 S.Ct. at 2042.[5]

BMI directs our attention to several opinions where, BMI maintains, the square footage of the establishment attempting to qualify for the exemption was discussed.[6]

5. Not only were square footage figures omitted from the Supreme Court's opinion in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 95 S.Ct. 2040, 45 L.Ed.2d 84 (1975), they also are nowhere to be found in either of the opinions from the courts below: *Twentieth Century Music Corp. v. Aiken*, 500 F.2d 127 (3d Cir.1974) (subsequent history omitted); *Twentieth Century Music Corp. v. Aiken*, 356 F.Supp. 271 (W.D.Pa.1973) (subsequent history omitted). Apparently, the dimensions of Aiken's shop first appeared in a published opinion in *Sailor Music v. Gap Stores, Inc.*, 516 F.Supp. 923, 924 (S.D.N.Y.), *aff'd*, 668 F.2d 84 (2d Cir.1981), *cert. denied*, 456 U.S. 945, 102 S.Ct. 2012, 72 L.Ed.2d 465 (1982), filed some five years after the enactment of section 110(5). There is no indication of the source of the information in the *Sailor* opinion.

6. *See, e.g., Broadcast Music, Inc. v. United States Shoe Corp.*, 678 F.2d 816 (9th Cir.1982) (square footage of the defendant stores was not even mentioned); *Broadcast Music, Inc. v. Jeep Sales & Serv. Co.*, 747 F.Supp. 1190 (E.D.Va.1990); *Hickory Grove Music v. Andrews*, 749 F.Supp. 1031 (D.Mont.1990); *Crabshaw Music v. K–Bob's of El Paso, Inc.*, 744 F.Supp. 763 (W.D.Tex.1990); *Merrill v. Bill Miller's Bar–B–Q Enters., Inc.*, 688 F.Supp. 1172 (W.D.Tex.1988); *Merrill v. County Stores, Inc.*, 669 F.Supp. 1164 (D.N.H.1987); *International Korwin Corp. v. Kowalczyk*, 665 F.Supp. 652 (N.D.Ill.1987), *aff'd*, 855 F.2d 375

Having reviewed these cases, we reject as totally inaccurate BMI's assertion that "in virtually every case the excessive square footage of the defendant's store alone was found to disqualify the defendant from invoking the Section 110(5) exemption." Brief of Appellant at 27 n. 14. The fact is that in none of these cases did the court base its decision solely on the square footage of the stores without considering the nature of the equipment, i.e., whether it was "homestyle," nor did any of them declare that they would have reached the same result based only upon the square footage of the infringing stores. Moreover, none of the cases cited has any binding precedential force in this Circuit.

The closest we come to Eighth Circuit precedent on this issue is this Court's dicta in *National Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726 (8th Cir.1986), in which the challenged action was the receipt via satellite antenna of blacked-out NFL games and the playing of the broadcasts on television sets in bars. Although the Court noted that "[t]he factors listed in the legislative history do speak of the size of the area where the transmission will be played," *id.* at 731, the Court said nothing about a maximum square footage. Further, the Court stated that the 1976 legislative history indicates that "to decide whether an infringement had occurred, the critical question instead would be the type of equipment used by the putative infringer." *Id.* at 730. The Court also quoted this language from the legislative history of the exemption:

> the clause would exempt small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customers' enjoyment, but it would impose liability where the proprietor has a commercial 'sound system' installed or converts a standard home receiving apparatus ... into the equivalent of a commercial sound system.

Id. at 730–31 (quoting H.R.Rep. No. 1476, 94th Cong., 2d Sess. 87 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5701). Clearly, this passage from the legislative history directs attention to the quality of the sound system used, and not to the square footage of the establishment using it.[7]

Although the legislative history is interesting, it is beside the point: we need only look to the statute itself. If Congress intended to impose a physical size limitation on the establishment qualifying for the exemption, it might easily have written it into the statute. But it did not; it did not even qualify the exemption by limiting its availability to a "small commercial establishment," the language of the legislative history. The statute focuses on the equipment being used, and so must we. This Court is not a legislative body, and it has no authority to rewrite the statute.

[4] The same observation applies fully to BMI's next argument: that the legislative history supports its contention that a section 110(5) exemption is available only if "the business [does] not have the ability to pay for its use of music or [is not] of sufficient size to justify, as a practical matter, a subscription to a commercial background music service." Brief of Appellant at 11. The legislative history BMI relies upon is this:

> the "for profit" limitation of the present statute. It applies to performances and displays of all types of works, and *its purpose is to exempt from copyright liability anyone who merely turns on, in a public place, an ordinary radio* or television receiving apparatus *of a kind commonly sold to members of the public for private use.*

H.R.Rep. No. 1476, 94th Cong., 2d Sess. 86 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5702 (emphasis added). That summary of the exemption makes no mention of any size or financial restrictions.

(7th Cir.1986); *Rodgers v. Eighty Four Lumber Co.*, 617 F.Supp. 1021 (W.D.Pa.1985); *Springsteen v. Plaza Roller Dome, Inc.*, 602 F.Supp. 1113 (M.D.N.C.1985); *Sailor Music v. Gap Stores, Inc.*, 516 F.Supp. 923 (S.D.N.Y.), *aff'd*, 668 F.2d 84 (2d Cir.1981), *cert. denied*, 456 U.S. 945, 102 S.Ct. 2012, 72 L.Ed.2d 468 (1982).

7. If BMI wishes to base its argument here on language from the legislative history, it should also note the opening remarks of the portion of the House Report that discusses section 110(5):

> Unlike the first four clauses of section 110, clause (5) is not to any extent a counterpart of

It is the intent of the conferees that a small commercial establishment of the type involved in *Twentieth Century Music Corp. v. Aiken*, which merely augmented a home-type receiver and which was not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service, would be exempt.

H.R.Conf.Rep. No. 1733, 94th Cong., 2d Sess. 75 (1976) (citation omitted), *reprinted in* 1976 U.S.C.C.A.N. 5810, 5816.[8]

The intent expressed in the report of the House conferees is irrelevant when the statutory language does not say or even imply that the size or financial wherewithal of the establishment has a bearing on eligibility for the homestyle exemption. As with the square footage requirement that BMI would have us read into the exemption, the opinions of other courts that mention this language do not persuade us that, even though Congress enacted the law without any such requirement, it truly intended a size-and-financial-means test to be a part of the statute. *See Claire's Boutiques*, 949 F.2d at 1492 ("no case has relied solely on the financial size or ability of the defendant as a reason for denying the application of § 110(5)"). Moreover, we surmise that any such requirement would surely run into constitutional problems for vagueness: who would determine when an establishment is "of sufficient size to justify ... a subscription to a commercial background music service," and what criteria would they use?

We hold that 17 U.S.C. § 110(5) does not require that the square footage of a qualifying establishment be less than 1055, with fewer than 620 square feet open to the public; nor does it require that the entity's ability to pay for a commercial background music service be considered. The focus of the statute is on the equipment in use, and as each of Edison's unlicensed stores uses only homestyle equipment each qualifies for the homestyle exemption.

III.

Finally, BMI argues that the District Court's decision defeats the purpose of the Copyright Act and conflicts with this country's international treaty obligations. We find no merit in BMI's contention that the District Court's interpretation of the statute expands the scope of the homestyle exemption beyond the intent of Congress. *See Aiken*, 422 U.S. at 163, 95 S.Ct. at 2047 ("exaction of such multiple tribute [by authorizing the sale of numerous licenses for a single broadcast of a copyrighted work] would go far beyond what is required for the economic protection of copyright owners, and would be wholly at odds with the balanced congressional purpose behind" the exclusive right of public performance) (footnote omitted). If Congress had intended the exemption to be limited so as to exclude large retail chain stores such as Edison, it might easily have shown that intention in the language of the statute. It did not and we will not assume that the omission was a mere oversight on the part of the legislators. We note there is here no contention, nor could there plausibly be, of a "'scrivener's error' producing an absurd result." *Union Bank*, — U.S. at —, 112 S.Ct. at 524, 116 L.Ed.2d at 525 (Scalia, J., concurring).

BMI's argument that this decision interferes with the international treaty obligations of the United States also fails.

8. BMI argues for expansion of this putative requirement and suggests that "of sufficient size to justify ... a subscription to a commercial background music service," the language found in the legislative history (and only in the legislative history), equates with "able to afford a commercial background music service or to pay the license fee to a performing rights organization." *See* Brief of Appellant at 29 ("it is beyond dispute that Edison has the ability to compensate the creators and publishers of the music that it uses in its stores"). This expansion would take us even further afield from the statutory language. The Eighth Circuit dicta BMI quotes as support for its argument says nothing about ability to pay: "the question as a practical matter is whether the defendant establishment is of the size and kind that Congress would expect to obtain a license through a subscription music service." *Nat'l Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726, 731 (8th Cir.1986) (decision denying section 110(5) exemption based primarily on the type of equipment used).

The treaty in question is the international copyright agreement known as the Berne Convention. Berne Convention for the Protection of Literary and Artistic Works, S. Treaty Doc. No. 27, 99th Cong., 2d Sess. (1986). The Convention, signed on September 9, 1886, as revised at Paris on July 24, 1971, entered into force for the United States on March 1, 1989. *See* Berne Convention Implementation Act of 1988, Pub.L. No. 100–568, § 13, 102 Stat. 2853, 2861 (1988). Congress then revised the Copyright Act (although section 110(5) was unaffected) and declared that the Act as amended "satisf[ies] the obligations of the United States in adhering to the Berne Convention and no further rights or interests shall be recognized or created for that purpose." *Id.* § 2(3), 102 Stat. 2853.

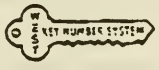
BMI asserts that the District Court's interpretation of section 110(5) to provide shelter for Edison under the homestyle exemption expands the scope of the exemption to such a degree that it renders section 110(5) in violation of the United States' treaty obligations under Article 11*bis* of the Berne Convention. Under that article, authors of artistic works have exclusive rights to authorize "the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work." Berne Convention, art. 11*bis*(iii), S. Treaty Doc. No. 27, 99th Cong., 2d Sess. 44 (1986). The flaw in BMI's argument is that the District Court's interpretation of section 110(5) does not expand the homestyle exemption, but merely declares that the statutory language means what it says. We cannot presume that Congress, in enacting this language, intended something else, and we know that Congress declared its handiwork to be consistent with the Berne Convention. Congress thus declared the public policy of the United States and, for us, that is the end of the matter.

Congress was emphatic that the United States' participation in the Berne Convention should not give rise to an expanded claim of copyright protection.

> No right or interest in a work eligible for protection under this title may be claimed by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto. Any rights in a work eligible for protection under this title that derive from this title, other Federal or State statutes, or the common law, shall not be expanded or reduced by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto.

17 U.S.C.A. § 104(c) (West Supp.1991). In view of this unmistakably clear congressional directive, BMI's claim to a "right or interest ... by virtue of ... the adherence of the United States" to the Berne Convention cannot be sustained.

The judgment of the District Court is affirmed.



STATEMENT OF HON. CRAIG THOMAS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WYOMING

Mr. THOMAS. Thank you very much, Mr. Chairman. I appreciate the opportunity to appear before your committee. As you know, we have introduced the bill H.R. 3288, which is designed to clarify the situation with respect to music used in these particular kinds of establishments in this particular kind of a way.

It is designed to amend the 1976 Copyright Act to provide places of public accommodation with an exemption from licensing fees relating to radio and television used in these establishments.

Currently, the law is vague and has, as the chairman has pointed out, caused a good deal of concern, and litigation and uncertainty. The issue is complex. No one would dispute the right of performers to be properly compensated for their music or their compositions.

However, the current law has caused confusion and hardship for many business owners in my State and indeed across the country. Every bar, restaurant and other establishment that serves food and drink in places of public accommodation has at one time or another been charged by the performing rights societies for television and radio programming they present in their establishments.

Actually, in the past I had some direct experience with this. I had a motel, full-service motel, so I have some experience with it. Unfortunately, the fees that are charged are confusing and ambiguous manner, and it is difficult for either the owner or the collector to know where we are.

I've heard from folks across Wyoming and indeed across the country that have experienced this trouble. Our bill is designed to clarify the law.

It would exempt small business operators from being charged fees for playing radios and televisions that are commonly used in private homes. In fact, Congress acted on this issue during the 94th Congress. The conference report accompanying the 1976 Copyright Act discusses at length the need to exempt from copyright liability businesses that merely operate ordinary radio and television apparatus in their establishments.

It is important to note a number of specific provisions in the bill that Ed has already pointed out. This legislation is designed to address the unique problem that restaurant and tavern owners are experiencing, clarifies the law so those individuals can operate their business without fear of costly litigation.

Important to note, the bill only deals with performances which are incidental to the main purpose of the establishment, and does not cover transmission where a fee is charged in order to hear the broadcast.

Tapes, jukeboxes, video recordings, are not—are not—covered in the bill.

The bottom line is the legislation is designed to help small business owners resolve a difficult problem. It will clarify the law. We look forward to working with members of the committee to making this a reality in simplifying the rules for businessmen.

Thank you again for allowing us the chance to appear.

Mr. HUGHES. Thank you very much, Craig.

[The prepared statement of Mr. Thomas follows:]

PREPARED STATEMENT OF HON. CRAIG THOMAS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WYOMING

Thank you Mr. Chairman for holding this hearing today regarding the issue of music licensing practices. I appreciate you giving me the opportunity to appear before you and discuss my bill H.R. 3288, which is currently pending before this subcommittee.

Mr. Chairman, as you know, on October 14, 1993, I introduced H.R. 3288, the "Public Accommodations Exception Act of 1993." This bill is designed to amend the 1976 Copyright Act to provide places of public accommodation with an exemption from licensing fees for music copyrights relating to radio and televisions used in these establishments. Currently, the law is vague and many restaurant and tavern owners across the country are being forced to pay licensing fees for operating these devices.

The issue of licensing fees is extremely complex. No one would dispute the right of performers to be properly compensated for their music or compositions. However, the current law is causing confusion and hardship for many business owners in my state and across the country. Every bar, restaurant and other establishment that serves food and drink in places of public accommodation has, at one time or another, been charged fees by the performing rights societies for the television and radio programming they present in their establishments. Unfortunately, many times these fees are charged in a confusing or ambiguous manner, without any oversight or controls.

I have heard from folks across Wyoming and the nation that have experienced trouble with the music-licensing organizations. Often the fees charged by the organizations for playing radios or televisions vary greatly from year to year. In addition, many times they are threatened with legal action or harassed for doing something they did not know was wrong.

My bill would exempt these small business operators from being charged fees for using radios and televisions that are commonly used in private homes. In fact, Congress acted on this issue during the 94th Congress. The Conference Report accompanying the 1976 Copyright Act discusses at length the need to exempt from copyright liability businesses that merely operate ordinary radio or television apparatus in their establishments.

It is important to note a number of specific provisions in my bill. This legislation is designed to address a unique problem that restaurant and tavern owners are experiencing. It clarifies the law so that these individuals can operate their businesses without fear of costly litigation. It is also important to note that this bill only deals with performances which are incidental to the main purpose of the establishment and does not cover transmissions where a fee is charged in order to hear or see that broadcast. Records, tapes, jukeboxes or video recordings are not covered by my bill.

Mr. Chairman, the bottom line is this bill is designed to help small business owners solve a very difficult and confusing problem. H.R. 3288 will clarify an ambiguous law and simplify the U.S. code so that it is understandable for everyone across the nation. I look forward to working with the members of the subcommittee on this legislation and am hopeful we can take action on this measure in the coming months.

Thanks again for allowing me to appear before the subcommittee today.

Mr. HUGHES. The bill would exempt a food or drink establishment from an obligation to pay royalties, so long as the use of a radio or television is incidental and no direct charge is made to see or hear the radio or television, as I understand it.

As drafted, the bill covers all copyrighted works, it seems to me, not just music. And under my reading, cable and satellite transmission would be covered.

Was it your intent to cover audiovisual works such as sports programming, and cable, and satellite transmissions as well?

Mr. THOMAS. The meaning "sports program" has already been dealt with, as a matter of fact. If the language needs to be more specific, Mr. Chairman, I would have—it is designed to be the kind of background things that you get through radio and television that are not the focus of attention, but rather the background. That is the intent of the bill.

Mr. HUGHES. Ed, the key is incidental. Would you just describe for us what you would intend to include by the term "incidental"?

Mr. PASTOR. Well, Mr. Chairman, cable, I think in my opinion, is excluded. There are sports bars where food, drink, and the sporting event that may be on television; there I would think that you would not have an exemption because the intent is to use the television sports program that is coming through as part of the environment. So I think in that case you would not exempt the transmission, but as for its background music or television on just for background, it is not the primary purpose, food and drink are the primary purpose, then I would see that as incidental.

Mr. HUGHES. Of course, the difficulty is that you go to an establishment often, or most people do, it seems to me because of the atmosphere, the ambiance, and music is a part of that. Obviously, music is an important part of that or else the restaurant owner or tavern owner would not pay the fee; they have an option: They could just turn it off, not permit it. So, obviously, music has some importance creating an atmosphere.

Where do you draw the line on what is incidental? For instance, I find it interesting that BMI would cover a television set of one dimension, 27 inches, whereby ASCAP, as I recall, would cover one that is at least 36 inches. I'm not sure what that has to do with incidental.

Mr. THOMAS. I think that is the point. Really, that argument over the size of the apparatus is really not important. The important part is whether it is the reason that the person came to the establishment. I think that is the telling point.

Mr. HUGHES. For instance, I was in a restaurant in Philadelphia just recently that my wife and I stopped into on our way back to the District. Surprisingly to us, in addition to the background music, some of the waiters at one point, on two occasions during the time we had dinner, started to sing. Would that be incidental in your judgment?

Mr. THOMAS. I think that's extremely incidental, as a matter of fact.

[Laughter.]

Mr. HUGHES. I thought it was pretty good.

Mr. THOMAS. And probably not solicited for the most part.

Mr. HUGHES. I sort of liked it. In fact, one of the reasons why I am going to go back, in addition to their good food, is that I found the entertainment to be absolutely marvelous, the two waitresses, and they had a saxophone player at one point. A waiter brought his sax out and started playing. But I would go back there because I enjoyed that music.

Mr. PASTOR. But I also think you probably go for the food and the drink that is also served. You know, sometimes you have waiters that sing "Happy Birthday" because it is somebody's birthday.

Now, people usually don't go there because they want to have a birthday party there or they are going to get cake. The establishment because of the food and drink is what takes them there.

Mr. HUGHES. I hope nobody is collecting any royalties because somebody sang "Happy Birthday" to them?

Mr. PASTOR. I don't know. In some cases there may be. That is where the confusion is.

Mr. HUGHES. I thought it might be an ASCAP song. I thank you. You've been very, very helpful to us.

Mr. PASTOR. Well, thank you.

Mr. HUGHES. And I commend you for focusing in on what has become a problem. There is no question it is something we need to take a look at and see whether the copyright statute, in particular the one exemption that you are talking about, is relevant to today's activities throughout the country.

Thank you. You've been very helpful.

Mr. PASTOR. Thank you, Mr. Chairman.

Mr. HUGHES. The gentleman from North Carolina.

Mr. COBLE. Thank you, Mr. Chairman. I will be very brief. I will just extend, to some extent, Mr. Chairman, your line of questioning.

First of all, I want to commend you all for introducing the bill because I think this highlights what may well be a problem that needs to be resolved.

Now, the chairman touched on it, at least indirectly. I think it is significant to distinguish to what degree of significance the music attracted the patron, and I think you all have touched on that.

If it is incidental, that's one thing; if it is the primary thrust for having him come to the establishment, that is indeed another. Congressman Thomas, I know that you—and perhaps Congressman Pastor too—have had hands-on experience because I believe at one time were you not a proprietor of an establishment similar to what we are discussing?

Mr. THOMAS. Yes.

Mr. COBLE. Let me put a question to you, and then we would be glad to hear from you all.

Over the years, Mr. Chairman, I am confident that we on the subcommittee have received numerous letters of complaints concerning methods of collection, particularly of the ultimate filing of a lawsuit.

Now, I'm not convinced, folks, that this is the best use of our court system. Would it not be possible to establish or formulate some sort of mechanism to settle these disputes in a different way?

In many instances—and this is where I want to hear from you, Congressman Thomas and/or Congressman Pastor—in many instances I think we are dealing with a mom and pop operation, a small operation, that probably has a very limited profit margin scheme. They don't want to have to drop what they are doing, run to court, Mr. Chairman, defend themselves, spend obvious time and money doing so, dealing with lawyers, dealing with litigation.

I guess my ultimate question is, is there not a better way? So, gentlemen, how about responding to me.

Mr. THOMAS. Well, it seems to me that the first thing—and I suppose the issue that is before this committee and before the Congress—is to define more clearly in the law what it is so that there isn't the kind of ambiguity that exists now.

And it could be that you can't make it entirely clear. I suppose there is some other sort of method of finding resolution. The difficulty generally has been that the controversy often is over a relatively small amount of money, over $300 or $500 or whatever. Clearly, it is not logical or possible even for a small business person to go to court to resolve those kinds of issues, so the usual result is that they go ahead and pay it or else take the equipment completely out of the operation. And that was the choice we made on live music. It wasn't worth the cost for us, but then I don't object to the live music fee, by the way. But you have to make those decisions.

The difficulty is being sort kind of forced into litigation and paying because you do not want to have the cost of defending yourself in court. So I think clarity in the statute is the first step.

Mr. PASTOR. There is no conflict with me because I neither have owned a restaurant or a bar either before this or now, so this is mainly the issue. I bring the issue because people have come to me and said this has been a problem for us in Arizona and other places in the Nation.

A possibility, if there could be agreement between the performing rights societies and the industry associations, if there could be some kind of agreement of how they would enforce it, this exemption is a possibility. If the industry and the performing rights come to an agreement on how it is going to be enforced, that might be a way of getting out of the courts all the time.

Mr. COBLE. Thank you, gentlemen. Thank you, Mr. Chairman.

Mr. HUGHES. The gentleman from Rhode Island.

Mr. REED. I would just like to commend the two gentlemen for their legislation. I think you focus on a very real problem for many small businesses.

Part of the problem was alluded to, I think, in both of your comments that for the individual business person it is a question of sort of having no choice, in a way. If they go to court, it is too expensive. To protest in other ways, it is too expensive.

I think what we would like to do is set up an arrangement so that they would be secure in knowing what they could do, and the system would police itself more effectively, so I want to commend you both for this legislation. I think it is very, very helpful for the small business community.

Mr. HUGHES. Thank you very much. You really have been very helpful to us and we appreciate the work you've put into this particular initiative, and we are intent upon seeing if we can't in someway deal with the problem.

Our first panel today consists of representatives from the three performing rights societies, ASCAP, BMI, and SESAC. Morton Gould, representing ASCAP, is a well-known symphonic composer and conductor, and no stranger to this subcommittee.

He is the author of many film, television, and Broadway scores. His compositions have been performed worldwide and by almost every American orchestra. He has received numerous honors for his achievements, among them a Grammy award. In 1986 until last week, Mr. Gould was the president of ASCAP. He currently serves as president emeritus.

We appreciate your willingness to appear before us today, Morton.

Marvin L. Berenson appears on behalf of BMI. Mr. Berenson is an experienced copyright attorney who has been with BMI since 1976. He was promoted to assistant vice president, licensing, a position that no doubt gave him considerable experience with the subject of these hearings today.

He is currently senior vice president and general counsel for the company. Mr. Berenson is active in domestic and international copyright organizations, and I am sure we will benefit from his expertise today.

Vincent Candilora is the president and chief operating officer of SESAC, formerly known as the Society of European Stage Authors and Composers. Mr. Candilora has been with the society since 1969. He is an officer of the Country Music Association, is on the advisory board of the Music and Entertainment Industry Educators Association, the board of directors of the Copyright Society, and on the Jukebox Licensing Committee. Mr. Candilora has also served as adjunct professor at New York University Music Business Department where he has lectured extensively on performing rights.

Mr. Candilora, I understand that SESAC is developing some innovative ways to license music. We look forward to that testimony. We welcome you here today. We have your statements which we've all read, and without objection they will all be made a part of the record.

We hope you can summarize for us, so we can get right to questions, but we will let you decide how you want to proceed.

Morton, welcome once again.

STATEMENT OF MORTON GOULD, PRESIDENT EMERITUS, THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS (ASCAP), ACCOMPANIED BY FRED KOENIGSBERG, SPECIAL COUNSEL, ASCAP

Mr. GOULD. Thank you, Mr. Chairman.

My name is Morton Gould, and I am a composer. I have been a member of ASCAP since 1935. I have been a member of its board of directors since 1959. I served as ASCAP's president for the past 8 years, and am now president emeritus.

I wish to thank you on behalf of ASCAP's more than 55,000 members who are located in every State of our great country for

the opportunity to come before you today and for your tireless work and that of your colleagues on behalf of America's creators and copyright owners.

We learned with regret of your decision to retire at the conclusion of this Congress, and we think copyright will have lost a strong voice when you step down.

Mr. Chairman, I am here today representing not merely the Gershwins and the Coplands, but the thousands of ASCAP members whose names you don't know, but whose songs you sing everyday. There is a phrase that is particularly apt for these hearings. "I never met an ASCAP member who thought he was being paid too much, and I never met a music user who thought he was paying too little."

I anticipate that the users groups, who have requested an audience at these hearings will tell you all sorts of stories about ASCAP and its sister organizations, about our so-called demands, about our alleged licensing practices and the like. I simply wish to tell you, Mr. Chairman, that in the words of a great ASCAP songwriter, "it ain't necessarily so."

I welcome the opportunity to set out the facts for you. The overriding fact which I ask that you keep in mind is that performing rights royalty, the money songwriters and music publishers earn from ASCAP's licensing of their works constitute the largest single source of their income. This is the money we use to feed our families and pay our bills and keep the music in the street an American success story. This is what enables us to devote our energies to creativity and so achieve the constitutional goal of promoting our country's progress in science and the useful arts.

I will touch upon ASCAP's licensing practices generally given the subcommittee's timetable. I refer you to my written statement for more details, and, with your permission, ASCAP will provide a written response for the record after we have heard the testimony of the next 2 days.

ASCAP is a voluntary, unincorporated membership association. Since its creation in 1914, ASCAP has served the needs of songwriters and music publishers, music users and the public at large. ASCAP's members—and those are more than 40 affiliated foreign performing rights societies—grant ASCAP the nonexclusive right to license the public performance of their vast repertory of copyrighted musical work.

ASCAP is a clearinghouse. Its licensees pay fees to obtain the blanket right to use the ASCAP repertory. The license fees ASCAP collects are distributed after deducting only operating costs to the creators and copyright owners of the works performed.

Virtually, all aspects of ASCAP's licensing activities are governed by Federal consent decree. Three provision of that decree are crucial to understanding ASCAP's licensing practices.

First, ASCAP can never say no to a user who is willing to pay a reasonable fee for a license. Simply by virtue of making a written request for a license, the user has one.

Second, ASCAP must license all similarly situated users on nondiscriminatory terms. Thus, all users in the same industry are entitled to the same form of license with the same rate schedule. We don't discriminate, and we don't make special deals.

Third and most importantly, if ASCAP and the user cannot agree on a reasonable license fee, a reasonable fee will be determined by the Federal court. The burden will be on ASCAP to prove the reasonableness of the fee it seeks. The user may continue to use our music even while we are attempting to prove the reasonableness of our proposal.

These provisions have stood the test of time, and have ensured fair treatment for users and ASCAP members alike. Wherever possible, ASCAP seeks to negotiate license terms with committees representing user industries. We find that since negotiation and cooperation pays dividends in gaining the goodwill of users.

Each ASCAP license agreement is tailored for the industry being licensed. To put it another way, the license fees and other license terms for each user industry are based on the judgment of the parties as to the value of music to that industry, and are structured to accord with the workings of the industry.

ASCAP refers to nonbroadcast and noncable licensees as "general licensees" and "general establishments," and I will use those terms here. It should come as no surprise to you that licensing general establishments is a very difficult task. Users do not exactly line up at our door for licenses.

For that reason, ASCAP understands that its first task is to undertake a significant educational effort so that the owners of general establishments understand that musical property is property which cannot and should not be used without payment of a reasonable price to the owners.

To license general establishments, ASCAP maintains a staff of field representatives all across the Nation, hundreds of men and women who find and visit establishments using music, explain the necessity for and benefits of an ASCAP license, and deal directly with the users.

ASCAP does not, as some would have you think, use gestapo tactics. And, as the composer of the music for the TV series "Holocaust," I find such allegations personally offensive. We carefully train and instruct our field representatives in ASCAP's operation in the law and in the proper and courteous way to approach you. I would be foolish to tell you there are no problems in this regard. We are, after all, discussing interactions among thousand of human beings, but I would certainly tell you that disputes are rare, and that we are very proud of the men and women who undertake this difficult job.

Mr. Chairman, despite all my years with of involvement at ASCAP, I am still astonished when users come to Congress and ask that their use of our intellectual property should be free. They would never dream of asking Congress, for example, to force bakers to provide bread to restaurants for free. Music is no different just because our property is intangible.

The unhappy fact seems to be that when people are asked to pay reasonable fees for musical property many look to find anyway to avoid doing so. They are not the majority, but those in a minority who would like to avoid paying for this property make vocal complaints either about the principle of payment or the manner in which payment is requested.

Mr. Chairman, I again want to repeat that ASCAP is always and happy to talk with users including those who will appear before you today and tomorrow. Indeed, we have already done so with many of them, and are more than willing to do so again. I hope these hearings will be a step toward changing any misperception you may have.

And, please, I respectfully ask you to remember that when you are speaking of ASCAP, you are not speaking of some impersonal organization or bureaucracy. You are speaking of a membership organization consisting of tens of thousands of men and women governed by a board of directors of the members' choosing. They are the people who create the music that speaks to the very heart of what America is all about.

I have with me ASCAP's director of licensing, Barry Knittel and ASCAP's special counsel, Fred Koenigsberg, and asked that they be allowed to answer any questions you might have. I want to thank you for your attention, and for furnishing the opportunity to appear today.

Mr. HUGHES. Thank you, Morton. Before I recognize Mr. Berenson, let me just tell you and offer my congratulations on your being promoted to the rank of president emeritus. You've had a most distinguished career, and we have all benefited from your greatness, really.

Mr. GOULD. Well, I appreciate that, really. I thank you very much.

[The prepared statement of Mr. Gould follows:]

Prepared Statement of Morton Gould, President Emeritus, the American Society of Composers, Authors and Publishers (ASCAP)

Mr. Chairman, my name is Morton Gould, and I am a composer. I have been a member of the American Society of Composers, Authors and Publishers -- ASCAP -- since 1935. I have been a member of its Board of Directors since 1959, and for the past eight years, it has been my honor to serve as ASCAP's President. Last week, I stepped down as President and am now President Emeritus of the Society.

I wish to thank you, on behalf of ASCAP's more than 55,000 members who are located in every state in our great country for the opportunity to come before you today, and for your tireless work and that of your colleagues on behalf of America's creators and copyright owners. We learned with deep regret of your decision to retire at the conclusion of this Congress, and I think it safe to say that copyright will have lost a strong voice when you step down.

Mr. Chairman, I wish to open my remarks with a phrase I heard some years ago and which I think is particularly apt given the subject matter of these oversight hearings. I never met an ASCAP member who

thought he was being paid too much, and I never met a music user who thought he was paying too little. That, in a nutshell, sums up what we are here for today. I anticipate that the user groups which have requested an audience at these hearings will tell you all sorts of stories about ASCAP (and its sister organizations), about our so-called "demands," about our alleged licensing practices, and the like. I simply wish to tell you, Mr. Chairman, that, in the words of a great ASCAP songwriter, "it ain't necessarily so." I welcome the opportunity to set out the facts for you.

The overriding fact which I ask that you keep in mind is that performing rights royalties -- the money songwriters and music publishers earn from ASCAP's licensing of their works -- constitute the largest single source of their incomes. This is the money we use to feed our families and pay our bills. It is through these royalties that America's songwriters can work at being songwriters, that America's music publishers can make the investments of capital needed to keep the music industry an American success story. As ASCAP's beloved late former President, Stanley Adams, was fond of saying, it is through these royalties that songwriting can be a vocation, rather than an avocation. This is what enables us to devote our energies to creativity, and so achieve the Constitutional

goal of promoting our country's progress in science and the useful arts.

I understand that you wish to address ASCAP's licensing practices generally and in four specific areas: 1) the communication of radio and television broadcasts in public establishments as a source of on-site music, which owners of those places use to enhance their atmosphere and hence their profitability; 2) the use of music by certain choral groups; 3) the use of music at conventions and expositions; and 4) the broadcast of music by radio stations with "religious" formats. I will touch upon each, but as you can understand, it will not be possible to anticipate all the questions which may be raised by the other witnesses today and tomorrow. ASCAP will therefore provide a more detailed analysis in a written response which we would ask you to allow us to put into the record after we have heard the testimony of the next two days.

ASCAP's Licensing Practices Generally

Let me start with a brief description of ASCAP. ASCAP is a voluntary, unincorporated membership association organized under the laws of the State of New York, with its principal offices in New York City. ASCAP is the oldest and largest organization in the United States that licenses the right to perform publicly copyrighted musical compositions.

Since its creation in 1914 by America's leading songwriters and music publishers, ASCAP has served the needs of songwriters and copyright owners, music users, and the public at large. More than 55,000 composers, lyricists and publishers, as well as the members of more than forty affiliated foreign performing rights societies, have granted ASCAP the non-exclusive right to license the public performance of a vast repertory of copyrighted musical works. ASCAP's licensees number in the tens and tens of thousands, spread throughout the length and breadth of the land. They are of great variety, and include television and radio networks and local stations, cable television program services and systems, restaurants, taverns, night-clubs, hotels, retail businesses, promoters and organizers of trade shows, conventions and consumer shows, shopping centers and shopping malls, background music services, colleges and universities, symphony orchestras, and others who employ music to entertain their customers and patrons. The right to license all of these users has been clearly affirmed over and over again in both the copyright law and the courts.

ASCAP is a clearinghouse -- its licensees pay fees to obtain the right to use any or all of the works in the ASCAP repertory, which includes works written by America's greatest songwriters (Irving Berlin, Cole Porter, Rodgers and Hammerstein, George Gershwin, Bob Dylan, Hal

David, Burt Bacharach, Stevie Wonder and Stephen Sondheim, and my successor as ASCAP's President, Marilyn Bergman and her husband Alan, to name only a few), and symphonic composers (such as Aaron Copland, Leonard Bernstein and Samuel Barber), as well as tens of thousands of foreign songwriters and composers. The license fees ASCAP collects are distributed, after deducting only operating costs, to ASCAP's members and the foreign performing rights societies with which ASCAP is affiliated. ASCAP's royalty distributions are the largest single source of income for most composer and songwriter members.

ASCAP operates under the terms of consent decrees and orders entered in United States v. American Society of Composers, Authors and Publishers, Civil Action No. 13-95, an antitrust action in the United States District Court for the Southern District of New York. Virtually all aspects of ASCAP's licensing activities are governed by the Amended Final Judgment entered in that action on March 14, 1950 (the "Amended Final Judgment").

Three provisions of the Amended Final Judgment are crucial to understanding ASCAP's licensing practices. First, ASCAP can never say "no" to a user who is willing to pay a reasonable fee for a license. Simply by virtue of making a written request for a license, the user has one. Second, ASCAP must license all similarly situated users on nondiscriminatory terms. Thus, all users in the same

industry are entitled to the same form of license, with the same rate schedule. Third, and most importantly, if ASCAP and the user cannot agree on a reasonable license fee, a reasonable fee will be determined by the United States District Court for the Southern District of New York. The burden will be on ASCAP to prove the reasonableness of the fee it seeks; the user may continue to use our music even while we are attempting to prove the reasonableness of our proposal. These provisions have stood the test of time, and have insured fair treatment for users and ASCAP's members alike.

Wherever possible, ASCAP seeks to negotiate license terms with committees representing user industries. Thus, for example, ASCAP has negotiated licenses for local radio stations with an All-Industry Radio Music Licensing Committee sanctioned by the National Association of Broadcasters, with roots going back to the 1930's; hotel and motel license agreements for decades with a committee of the American Hotel and Motel Association; and college and university license agreements with the Higher Education Music Copyright Task Force representing many organizations, including the American Council on Education.

Each ASCAP license agreement is tailored for the industry being licensed. Put another way, the license fees and other license terms for each user industry are based on the judgment of the parties as to the value of music to

that industry, and are structured to accord with the workings of the industry.

ASCAP refers to non-broadcast and non-cable licensees as "general licensees" or "general establishments," and I will use those terms here. It should come as no surprise to you that licensing general establishments is a very difficult task. Users do not exactly line up at our door for licenses. For that reason, ASCAP understands that its first task is to undertake a significant educational effort, so that the owners of general establishments understand that musical property is property like any other, and that it cannot and should not be used without the permission of, and payment of a reasonable price to, the owners. ASCAP therefore is constantly speaking to users wherever they gather, appearing at trade shows, participating in their efforts and causes, and making available as much educational information about the copyright law and ASCAP as possible, all for the purpose of making users understand that intellectual property is just that.

ASCAP goes about licensing users in a variety of ways. First, we always make an effort to negotiate licenses with the significant trade associations which represent the industries being licensed. We find that such negotiation and cooperation pays dividends in gaining the goodwill of users. We also maintain staffs of field

representatives all across the nation -- hundreds of men and women who find and visit establishments using music, explain the necessity for an benefits of an ASCAP license, and deal directly with the users. We carefully train and instruct our field representatives in ASCAP's operations, in the law, and in the proper and courteous way to approach users. I would be foolish to tell you that there are no problems in this regard from time to time. We are, after all, discussing interactions among thousands of human beings, in a wide variety of activities. It is inevitable under these circumstances that disputes will arise. But I would certainly tell you that these are rare, and that we are very proud of the men and women who undertake this difficult job.

And make no mistake -- licensing general establishments is not easy. I only wish the users of music were as courteous to and forthcoming with our representatives as our representatives are with them. For the fact is that no matter how much education we do, no matter how polite and courteous and reasonable the men and women who represent ASCAP are, we frequently meet with resistance, not to say outright hostility, to the notion that music is the property of its creators which should be paid for like other property. Despite all my years of involvement with ASCAP, I am still astonished and dismayed when users come to Congress and ask that **their** use of this

intellectual property should be free. They would never dream of doing so for the other property they use. What would Congress' reaction be if restaurant owners asked you to force those who bake bread to provide it to their restaurants for free? We are in no different position just because our property is intangible.

The unhappy fact seems to be that, when people are asked to pay reasonable fees for musical property, many look to find any way to avoid doing so. They are not the majority. But those in the minority who would like to avoid paying for this property are not loath to make vocal complaints either about the principle of payment or the manner in which payment is requested. Nevertheless, ASCAP always has sought good relations with music users. We only ask that our goodwill be reciprocated. Let me now turn, to the degree that I can, to the specific areas we have been told will be discussed.

The Use of Music in Public Establishments by Communication of Broadcasts

The performance of music in public establishments using the communication of broadcasts -- usually by radio-over-loudspeaker systems, but lately by large-screen or multiple television sets as well -- has a long and convoluted legal history, going back to a 1931 Supreme Court decision. Suffice it to say that, in its considerations of the 1976 Copyright Act, Congress considered the issue in what to a lay person can only be

described as excruciating detail. It concluded that it would do two things: it would codify ASCAP's licensing practices which arose after that 1931 decision, and set a licensing standard basically compatible with those practices, based on a 1975 Supreme Court decision.

Thus, Congress established the exemption found in §110(5) of the Copyright Act. It exempts from copyright liability certain limited uses of radio and TV broadcasts in public establishments, and requires a license in those circumstances where the uses are comparable to other types of uses for which license fees must be paid.

Mr. Chairman, the legal convolutions of this matter are, thankfully, not within my expertise. I would ask that you consider a few things in this regard, however:

1. ASCAP has been scrupulous about adhering to the letter and spirit of the law in its licensing practices. We do not pursue establishments which are exempt under the law under any reasonable reading of it. Indeed, a review of the many cases we have brought since the law's enactment will show that the courts have agreed with us in virtually all cases. We have bent over backwards to refrain from pressing licensing when any reasonable interpretation of the law would allow an establishment to be exempt. (I am attaching a summary of the law and the cases which ASCAP provides to those who ask

for an explanation, which sets forth the background of this area in more detail.)

2. The license fees we charge are by any standard eminently reasonable, not to say cheap. The average fee works out to less than $1 a day -- less than the price of one beer in just about any establishment.

3. We have repeatedly offered to sit down with representatives of the concerned trade associations and work out the terms of mutually acceptable license arrangements. We renew that call today. Our licensing arrangements are not carved in stone, and we welcome the involvement of such groups, because they make our job easier. All they have to do is accept our invitation.

For all these reasons, and for the general reasons I have articulated, the notion that users of music should not compensate the creators of that music for its use should be emphatically rejected.

Choral Group Licensing

Mr. Chairman, I must say that we are a bit baffled that the subject of choral group licensing is being raised. As we do not know what the particular subject matter of the discussion will be, we will await the testimony of those appearing.

Convention and Exposition Licensing

I am also attaching to my statement a summary of ASCAP's dealings with the convention and exposition

industry. We must proceed from the law's proper requirement that, if music is used in these venues, it should be licensed, just as other music uses are licensed. That said, the fact is that ASCAP first approached the Convention Liaison Council -- a trade association of such users -- in 1988 in an effort to negotiate a reasonable license. They showed not the slightest interest in doing so.

Thus, in 1989, ASCAP promulgated a license, only then to be contacted by another trade association, the National Association of Exposition Managers (NAEM, now the International Association of Exposition Managers), which asked to negotiate a different form of license. ASCAP agreed and did so, and the NAEM endorsed the agreement, issued a joint press release, and advised its members that ASCAP's rights were legally sound.

ASCAP was then contacted by a "Music Licensing Task Force" representing many organizations, and asked to renegotiate the NAEM license! We agreed, and even negotiated separately with NAEM to revise their agreement. Those negotiations reached a happy conclusion in 1990.

This is hardly the history of an organization unresponsive to the needs and requests of users. To the contrary, as the detailed attachment shows, ASCAP has repeatedly been willing to meed those needs.

Radio Broadcasters with "Religious" Formats

I am also attaching to my statement a summary of ASCAP's dealings with "religious broadcasters." This fast-growing segment of the radio industry seems to believe it is entitled to use the property of music creators for free because of the content of their broadcasts. Yet as the summary makes clear, these broadcasters not only pay for other property as do all other businesses, but operate their stations on the same business basis as do other broadcasters. They are pressing their arguments in Court, under the Amended Final Judgment, and we expect that the Court will deal fairly with them.

* * *

Mr. Chairman, I again want to repeat that ASCAP is always happy and willing to talk with users, and always seeks to treat them with respect and courtesy. I believe our licensing practices reflect that fact. And we are grateful that the vast majority of users extend the same respect and courtesy to us. I would only ask that you not be misled into believing that the disputes which inevitably arise in the unique circumstances in which music creators find themselves reflect anything other than normal disagreements common to the human species. I hope these hearings will be a step towards changing any misperception you may have. And please, I respectfully ask you to remember that when you are speaking of ASCAP, you are not

speaking of some impersonal organization or bureaucracy. You are speaking of the tens of thousands of men and women in this country who create the music that speaks to the very heart of what America is all about. Thank you for your attention, and for furnishing the opportunity to appear today.

ASCAP
AMERICAN SOCIETY OF COMPOSERS AUTHORS & PUBLISHERS

Office of General Counsel

October, 1993

MEMORANDUM Re: Radio-over-Speaker, Audiovisual And Other Mechanical Uses

This memorandum sets forth the legal authority holding that performances of copyrighted music by means of "radio-over-speakers" and similar systems -- for example, systems incorporating audio and video tape recorders, record and disc players, or large-screen televisions -- require the permission of copyright owners.

* * *

"Radio-over-speakers" generally describes a system which includes a radio receiver connected to speakers which are arranged so that employees and/or customers can hear the music. Such systems may also have public address, paging and music-on-hold components. Typically, radio-over-speaker systems are found in such establishments as restaurants, large and small retail stores and showrooms, shopping malls, movie theaters, health clinics and factories.

Other mechanical music systems may incorporate television receivers, or tape recorders, or turntables connected to amplification equipment and speakers, and are likely to be found in the same kinds of establishments as radio-over-speaker systems. Not infrequently, an establishment's music system may employ two or more kinds of mechanical music devices.

It is clear from the language of the copyright statute, its legislative history, and relevant cases that most performances of copyrighted music by means of radio-over-speakers and similar equipment are public performances within the scope of protection afforded copyright owners. This means that without a license from the copyright owners or their representatives, such performances are infringements of copyright.

* * *

Under the Copyright Law, the copyright owner of a musical work owns the exclusive right to perform the work publicly. See Section 106(4). (References are to sections of the United States Copyright Law, Title 17, United States Code.) Section 101 contains definitions pertinent to the performing right. To begin:

> To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

Further, to perform a work "publicly" means:

> (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
>
> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times. (Emphasis added.)

To "transmit" a performance or display is:

> [T]o communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

In addition to the statutory language, the legislative history of Section 106(4) explains that:

> Under the definitions of "perform," "display," "publicly" and "transmit" in Section 101, the concepts of public performance and public display cover not only the initial rendition or showing but also any further act by which that rendition or showing is transmitted or communicated to the public. Thus, for example: a singer is performing when he or she sings a song; a broadcasting network is performing when it transmits his or her performance (whether simultaneously or from records); a local broadcaster is performing when

> it transmits the network broadcast; a cable broadcast television system is performing when it retransmits the broadcast to its subscribers; and any individual is performing whenever he or she plays a phonorecord embodying the performance or communicates the performance by turning on a receiving set. Although any act by which the initial performance or display is transmitted, repeated, or made to recur would itself be a "performance" or "display" under the bill, it would not be actionable as an infringement unless it were done "publicly," as defined in Section 101.

H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 63 (1976) (hereinafter "House Report") (emphasis added); see also S. Rep. No. 94-473, 94th Cong., 1st Sess. 59-60 (1975).

* * *

There has never been any doubt that the Copyright Law affords protection to copyright owners whose music is being performed mechanically by means of records or tapes. The quoted language of the legislative history expresses this intent, and the courts have held, for example, that unauthorized performances of recorded music furnished to an establishment by an unlicensed background music service were infringements of copyright, Harms, Inc. v. Sansom House Enterprises, Inc., 162 F. Supp. 129 (E.D. Pa. 1958); that unauthorized performances of phonorecords being played throughout a retail establishment were infringements of copyright, Chappell & Co. v. Middletown Farmers Market & Auction Co., 334 F.2d 303 (3rd Cir. 1964); and that unauthorized performances given by a disk jockey playing records in a nightclub were also infringements of copyright, Wow & Flutter Music v. Len's Tom Jones Tavern, Inc., 606 F. Supp. 554 (W.D.N.Y. 1985).

The 1976 Copyright Act provided a very limited exemption for certain radio-over-speaker and television performances. The pertinent statutory language, the legislative history and cases which have interpreted the exemption make it clear that it is narrow in scope and available only to a small category of users.

* * *

The exemption for certain radio-over-speaker and television performances is found in Section 110(5). The exemption applies to:

> [C]ommunication of a transmission embodying a performance or display of a work by the public

> reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless --
>
> (A) a direct charge is made to see or hear the transmission; or
>
> (B) the transmission thus received is further transmitted to the public. (Emphasis added.)

Most radio-over-speaker systems and large-screen television installations are not found in establishments which directly charge their customers to see or hear such transmissions. Exceptions do exist, however: to cite three examples, so-called "laser-music" shows, coin-operated television sets in airport lounges, and hotels or arenas which furnish closed-circuit telecasts of championship boxing matches.

In most cases, the Section 110(5) exemption is inapplicable because the receiving apparatuses being employed are clearly not "of a kind commonly used in private homes" or the transmissions being received by the establishments are "further transmitted to the public."

Apart from limiting the applicability of this exemption, Congress also intended that the new copyright statute overturn the legal rationale for a 1975 Supreme Court decision, Twentieth Century Music Corp. v. Aiken, 422 U.S. 151. In that case, the Court had held that retransmissions of radio broadcasts in a small fast-food shop were not performances under the 1909 Copyright Law. The House Judiciary Committee, in its report on the proposed Section 110(5) exemption, noted:

> Under the particular fact situation in the Aiken case, assuming a small commercial establishment and the use of a home receiver with four ordinary loudspeakers grouped within a relatively narrow circumference from the set, it is intended that the performances would be exempt under clause (5). However, the Committee considers this fact situation to represent the outer limit of the exemption, and believes that the line should be drawn at that point. Thus, the clause would exempt small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customers' enjoyment, but it would impose liability where the proprietor has a commercial "sound system" installed or converts a standard home receiving apparatus (by augmenting it with sophisticated or extensive amplification equipment) into

> the equivalent of a commercial sound system. Factors to consider in particular cases would include the size, physical arrangement, and noise level of the areas within the establishment where the transmissions are made audible or visible, and the extent to which the receiving apparatus is altered or augmented for the purpose of improving the aural or visual quality of the performance for individual members of the public using those areas.

H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 87 (1976).

Before the 1976 Copyright Revision Bill was enacted into law, it was the subject of a House-Senate conference. As a result, a Conference Report was issued, and it, too, discussed the Section 110(5) exemption:

> With respect to section 110(5), the conference substitute conforms to the language in the Senate bill. It is the intent of the conferees that a small commercial establishment of the type involved in Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975), which merely augmented a home-type receiver and which was not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service, would be exempt. However, where the public communication was by means of something other than a home-type receiving apparatus, or where the establishment actually makes a further transmission to the public, the exemption would not apply.

Conf. Rep. No. 94-1733, 94th Cong., 2d Sess. 75 (1976).

In practical terms, the legislative history teaches that to determine whether a particular radio-over-speaker or television system is within the scope of the exemption, one must analyze the nature of the receiving apparatus and the business itself. The starting point for such an analysis is the fact situation in the Aiken case: a small fast food restaurant with a public area of 620 square feet and a radio receiver connected to four ceiling-installed speakers. With these facts as the "outer limit" of the exemption, courts have held that the exemption is not applicable to:

> --"The Gap" chain of clothing stores, having an average selling area of 3500 square feet and employing radio receivers augmented with amplification equipment, connected to recessed speakers arranged so that music was audible throughout the

stores. Sailor Music v. Gap Stores, Inc., 516 F. Supp. 923 (S.D.N.Y. 1981), aff'd per curiam, 668 F.2d 84 (2d Cir. 1981), cert. denied, 456 U.S. 945 (1982).

--The "Casual Corner" chain of women's clothing stores, employing commercial monaural receivers and four or more recessed ceiling speakers. Broadcast Music Inc. v. United States Shoe Corp., 211 U.S.P.Q. 43 (C.D. Cal. 1980), aff'd, 678 F.2d 816 (9th Cir. 1982).

--A small chain of grocery stores with public selling areas ranging from 10,000 to 14,500 square feet, employing "Radio Shack" radio receivers connected to six to ten ceiling-mounted speakers not arranged within a narrow circumference from the receivers. (The court concluded that such systems were not "receiving apparatuses of a kind commonly used in private homes"; rather, they were "akin to a commercial background music system.") Lamminations Music v. P & X Markets, Inc., 1985 Copyright Law Decisions ¶ 25,790 (N.D. Cal. 1985).

--The "Eighty Four Lumber Company" chain of stores, each with a public area larger than 10,000 square feet and employing systems comprised of radio receivers, separate amplifiers and microphones connected with 2 to 5 speakers mounted throughout the stores' interior selling areas and 1 to 3 speakers mounted outside the stores, all speakers being approximately 150 feet away from the radio receivers and amplifiers. (The court rejected the argument that the exemption was applicable because the sole purpose for using music was to muffle the industrial noise of the workplace.) Rodgers v. Eighty Four Lumber Company, 617 F. Supp. 1021, 1022 (W.D. Pa. 1985).

--A restaurant employing a satellite dish antenna connected to a television receiver to pick up signals for "blacked out" football games. (Considering the various components of the system, the court held that it was not a receiving apparatus of a kind "commonly found in private homes.") National Football League v. McBee & Bruno's, Inc., 792 F.2d 726 (8th Cir. 1986).

--A 2,664-square foot, 200-seat restaurant, employing a sound system comprised of a radio receiver -- located in a private office, with paging capabilities and able to drive up to 40

speakers -- connected via concealed wiring to eight ceiling-mounted speakers dispersed throughout the public areas of the restaurant. (The court held that the restaurant's system "successfully served as background music -- creating an atmosphere and muffling unpleasant noises -- precisely the type of performance which is not exempted under the Act.") International Korwin Corp. v. Kowalczyk, 665 F. Supp. 652, 658 n.2 (N.D. Ill. 1987), aff'd on other grounds, 855 F.2d 375 (7th Cir. 1988).

--A hardware store with 13,000 square feet of floor area open to the public, employing 14 or 15 recessed ceiling speakers interconnected to a radio receiver which broadcast music throughout the store 24 hours a day, a paging override device providing public address functions, and a music-on-hold component. (The court rejected the argument that there had been no infringement because the music was for the benefit of employees rather than customers; rather, the purpose of using music was in part "to increase employee productivity and thereby indirectly increase and enhance sales.") Merrill v. County Stores, Inc. 669 F. Supp. 1164, 1170 (D.N.H. 1987).

--A chain of 36 restaurants, each between 1000 and 1500 square feet in size and seating from 100 to 125 people, with only two functioning ceiling-mounted speakers spaced 30 feet apart, connected by hidden wires to a receiver in a storage room or closet. Each set of one receiver and two speakers cost about $118.00. (The court observed that "[t]he fact that individual components of the entire apparatus may be 'home-type' does not make the entire apparatus 'home-type.' Rather, all the features of the complete apparatus must be considered in determining whether it is 'home-type' ...") Merrill v. Bill Miller's Bar-B-Q Enterprises, Inc., 688 F. Supp. 1172, 1175 (W.D. Tex. 1988).

--A small chain of supermarkets with public areas of between 10,000 and 18,500 square feet with six to ten speakers in each store. (The court held that the receiving apparatuses were not of a type commonly found in homes; and the infringing performances were "further transmitted to the public," both because of the square footage of the supermarkets (the "size" test) and because the transmissions were received in the manager's

offices and then further transmitted through concealed wires to the stores' ceiling speakers (the "location of the receiving apparatus" test).) Little Mole Music v. Mavar's Supermarket No. 4, Inc., 1989 Copyright Law Decisions ¶ 26,440 (N.D. Ohio 1988).

--An 1,824-square foot restaurant consisting of a lobby, lounge, banquet room, and two dining rooms with a combined seating capacity of 172 at 43 tables, employing a "Sanyo" portable am/fm radio/cassette player located in the lobby and connected to eight to ten 10-inch recessed ceiling speakers located in the restaurant dining rooms and lobby. (The court held that the restaurant was "not a small commercial establishment of the kind which qualifies for §110(5) exemption protection"; that the radio broadcasts were "further transmitted"; and that "[w]hen all of the features of the system are considered...the system can only be characterized as the kind of commercial system specifically excluded from the coverage of §110(5).") Gnossos Music v. DiPompo, 13 U.S.P.Q. 2d 1539, 1542 (D. Me. 1989).

--A franchisee of "K-Bob's Steakhouses," which had a commercially-installed sound system consisting of a tuner connected to a public address system with eleven speakers. The restaurant was 7,000 square feet in size and grossed between $800,000 and $900,000 in revenues annually. (The court observed that "the fact the patrons could not always hear the music, or could only hear it in certain sections of the restaurant is not dispositive as it is the general atmosphere to which such music contributes which benefits therefrom.") Crabshaw Music v. K-Bob's of El Paso, Inc., 744 F. Supp. 763, 767 (W.D. Tex. 1990).

--An auto dealership with a sound system consisting of a radio receiver connected to at least four speakers recessed in the ceiling of the showroom and four public address horns mounted on light poles outside. Broadcast Music, Inc. v. Jeep Sales & Service Co., 747 F. Supp. 1190 (E.D. Va. 1990).

--A restaurant 1192 square feet in size (the public area was 880 square feet) with a sound system comprised of an amplifier, tuner, audio cassette deck and five recessed ceiling speakers

located between 30 and 45 feet from the amplifier. (The court held that the receiving apparatus was not of the kind commonly found in homes; the broadcast performances of plaintiffs' songs were "further transmitted" over the sound system from the restaurant's lobby to its dining rooms because "the courts have interpreted 'to further transmit' to mean any dispersal of sound through a restaurant or other establishment"; and the restaurant was of sufficient size to warrant the imposition of liability.) Hickory Grove Music v. Andrews, 749 F. Supp. 1031, 1036-1038 (D. Mont. 1990).

--A bar and restaurant employing a radio-over-speaker system consisting of a radio receiver located behind the bar connected to 20 ceiling-mounted speakers, which the court concluded was not a "home-type system" and which was used to "further transmit" the infringing performances. U.S. Songs, Inc. v. Downside Lenox, Inc., 771 F. Supp. 1220, 1227 (N.D. Ga. 1991).

In 1990, ASCAP's principal competitor, Broadcast Music, Inc. (BMI), apparently sought to license at least two chain retail clothing store operators who employed radio-over-speaker systems. The systems consisted of inexpensive receivers connected to two speakers -- ceiling installed in one case, and box-type mounted on shelves in the other. Those licensing efforts resulted in two lawsuits in which the courts held that each store's radio-over-speaker system constituted "a single receiving apparatus of a kind commonly used in private homes." The decisions in the two BMI cases are Broadcast Music, Inc. v. Claire's Boutiques, Inc., 754 F. Supp. 1324 (N.D. Ill. 1990), aff'd, 949 F.2d 1482 (7th Cir. 1991), cert. denied, ___ U.S. ___, 60 U.S.L.W. 3769 (May 18, 1992); and Edison Bros. Stores, Inc. v. Broadcast Music, Inc., 760 F. Supp. 767 (E.D. Mo. 1991), aff'd, 954 F.2d 1419 (8th Cir. 1992), cert. denied, ___ U.S. ___, 60 U.S.L.W. 3769 (May 18, 1992). It should be noted that ASCAP had not sought to license performances by means of the radio-over-speaker systems at issue in the two BMI cases.

Since the Supreme Court declined to review the appellate decisions in the two BMI cases, there exists some uncertainty as to the precise parameters of the exemption for radio-over-speaker and other mechanical performances. That uncertainty was demonstrated by the recent decision in Cass County Music Co. v. Vasfi Muedini, 821 F. Supp. 1278 (E.D. Wis. 1993), in which the court, primarily considering only the receiver, applied the exemption to performances in a restaurant with a public dining area of approximately 1500 square feet, seating for 128 patrons, and a receiving apparatus consisting of a receiver and separate control panel connected to nine ceiling-installed speakers by

means of 70-volt transformers and commercial, parallel-wired circuitry. Although the decision is being appealed and is likely to be reversed, it demonstrates that a correct analysis of a claim of exemption under Section 110(5) must focus upon the components of the entire receiving apparatus as well as the type of business seeking to avail itself of the exemption.

Law review articles exploring the meaning and scope of the Section 110(5) exemption include: Shipley, "Copyright Law and Your Neighborhood Bar and Grill: Recent Developments in Performance Rights and the Section 110(5) Exemption," 29 Ariz. L. Rev. 476 (1987); and "Note, Copyright Liability for Performances of Musical Works: Use of Background Radio Music in the Aftermath of Twentieth Century Music Corp. v. Aiken," 43 Washington and Lee L. Rev. 245 (1986). See also, 2 Nimmer On Copyright, §8.18[C][2] (1990).

* * *

Finally, the license agreements between ASCAP and its licensed broadcasters specifically exclude any further transmission of the stations' broadcasts. The relevant language in ASCAP's radio license agreements is as follows:

> Nothing in this agreement shall be construed as authorizing Licensee to grant to others any right to perform the music publicly or reproduce in any manner any of the musical compositions licensed under this agreement, or as authorizing any receiver of any radio broadcast to perform publicly or reproduce the same in any manner.

ASCAP's license agreements with its television licensees contain virtually identical language. Quite simply, this means that no radio or television station may represent to local businesses that its license agreement with ASCAP authorizes retransmissions of the station's broadcasts which otherwise must be licensed under the Copyright Law.

* * *

To conclude, the relevant statutory language, the legislative history, and cases interpreting analagous provisions of the Copyright Law make it clear that most public performances given by means of radio-over-speaker and large-screen television systems require proper authorization. For works in the ASCAP repertory, that authorization may be obtained through an ASCAP license agreement.

ASCAP'S LICENSING OF CONVENTIONS, EXPOSITIONS, TRADE SHOWS AND SIMILAR EVENTS

There are quite literally thousands of conventions, expositions, industrial shows, meetings, trade shows and similar events presented in the United States each year. These events vary in size, number of locations at which they may take place, and the manner in which music is performed in conjunction with such events. For example, a convention, exposition or trade show may have many or few exhibitors, and many or few persons who pay or register to attend the event. Activities at such an event all may be held at the same location, or at several locations simultaneously, or at different locations at different times. Music may be presented by the organizer or sponsor of the event, by exhibitors, or both, and may be performed "live" by musicians and singers, or by mechanical means such as records, tapes, CDs, radio-over-loudspeaker systems, or elaborate, "multi-media" audio-visual systems.

In its efforts to license all who should be licensed to perform music publicly, ASCAP seeks the most efficient, cost-effective way to license music users in a manner which ensures that all similarly situated users will be treated uniformly. These principles reflect ASCAP's concern that it comply with § IV(C) of the 1950 Judgment which prohibits ASCAP from "discriminat[ing] in license fees or other terms and conditions between licensees similarly situated." ASCAP also seeks to minimize the administrative cost of our licensing activities in order to maximize the royalties available for distribution to our writer and music publisher members and to the members of affiliated

foreign performing rights societies. In the case of conventions, trade shows and similar events, ASCAP uniformly has sought to license the sponsors of such events for all musical performances presented during and as part of their events, including those presented by the sponsors themselves, as well as those presented by exhibitors.

Given the diverse characteristics of conventions, trade shows and similar events, this approach makes the most practical sense because it is the only means by which all performances presented during and as part of such events can be authorized in a single transaction. It also recognizes the nature of a business in which sponsors realize an economic benefit from exhibitors who pay for the right to exhibit at events (as well as additional sums for event-related activities like advertising); and sponsors retain adequate authority to police their events to assure that exhibitors comply with applicable laws, rules and regulations.

If, however, ASCAP were to license exhibitors, multiple licenses would be required for each convention and trade show (a separate license for each exhibitor performing music), and then only those performances presented by licensed exhibitors would be authorized; all other unauthorized performances would be infringements of copyright. Because of the large number of events, and even larger number of exhibitors, if ASCAP were to license exhibitors rather than event sponsors, it is likely that fewer performances would be licensed overall; license fees would have to

be higher because of ASCAP's greater licensing costs; and there would be many more infringing performances of copyrighted works.

Similar inefficiency and added cost would result if ASCAP licensed performances at conventions and trade shows by licensing the locations at which activities at such events were presented. Once again, multiple licenses would be necessary for each event having activities at more than a single location, and then only those performances taking place at licensed locations would be authorized; all other unauthorized performances presented in conjunction with such events would violate the copyright owners' rights.

Guided by the foregoing considerations, ASCAP first approached major trade associations in the convention and trade show industry in 1988 by contacting the Convention Liaison Council (an industry planning and advisory group) and offering to negotiate an industry-wide license agreement. ASCAP anticipated that the industry would recognize the obligation of event sponsors to obtain authorization for performances of music at their conventions, trade shows and similar events. That was not the case, however -- neither the Convention Liaison Council nor any of the industry's leaders indicated the slightest interest in ASCAP's offer.

Unable to interest the convention and trade show industry in negotiations, ASCAP in 1989 unilaterally promulgated a form of license agreement for sponsors of conventions, trade shows and similar events. The new agreement was offered to those

event sponsors who we could identify from publicly available trade sources.

Shortly after ASCAP promulgated its new form of license agreement for conventions, trade shows and similar events, representatives of a major trade organization, the National Association of Exposition Managers ("NAEM"), contacted ASCAP and asked that ASCAP negotiate a different form of license agreement. Interestingly, NAEM itself was a member of the Convention Liaison Council when that organization rejected ASCAP's offer to negotiate an industry-wide license agreement. (NAEM recently changed its name to the "International Association of Exposition Managers.")

NAEM's negotiators represented a wide range of interests within the convention and trade show industry, and included Daniel J. Sladek, World of Concrete; Nancy P. King, Expositions-Meetings-Conventions, Inc.; Gary Shapiro, Esq., General Counsel, Electronic Industries Association; and Donald J. Walter, the President of NAEM. NAEM was also represented by its General Counsel, Sheldon I. London, Esq., of the Washington, D.C. law firm of London & Satagaj.

After months of discussions and two all-day meetings, ASCAP agreed with the NAEM on a new form of agreement to be offered to sponsors of conventions, trade shows and similar events.

On March 2, 1990, a joint press conference announcing the new agreement was held in Washington, D.C., where the NAEM

has its offices. A copy of the ASCAP-NAEM joint press release, dated March 2, 1990 and captioned "NAEM ENDORSES ASCAP REVISED LICENSE AGREEMENT FOR EXPOSITION INDUSTRY," is annexed as Attachment A.

For its part, NAEM sent a letter to its members dated March 2, 1990, a copy of which is annexed as Attachment B. In that letter, NAEM advised its members of the successful conclusion of negotiations with ASCAP and stated that, in the opinion of NAEM, the new form of license agreement ". . . is more fair and more reasonable than the license offered in 1989." In addition, NAEM stressed that it had undertaken negotiations with ASCAP "only when it became absolutely clear that ASCAP's request for a license could be legally sustained by federal law and case precedents." The license agreement authorized all performances of music in the ASCAP repertory presented during, and as part of, licensed events.

At NAEM's request, ASCAP agreed that for those event sponsors who had signed ASCAP license agreements in 1989 and paid license fees, ASCAP would credit license fees already paid to those due under the new agreement for 1990. The ASCAP-NAEM agreement was offered to the industry generally, but only a few trade show producers accepted it.

Shortly thereafter, ASCAP was approached by a "Music Licensing Task Force," comprised of representatives of the American Society of Association Executives ("ASAE"), Meeting Planners International ("MPI"), the Religious Conference Managers

Association ("RCMA") and the Professional Convention Management Association ("PCMA"), which in the aggregate represented a larger number of trade show producers than NAEM. The Music Licensing Task Force expressed the view that the new form of ASCAP license agreement negotiated with NAEM did not address the real concerns or needs of the convention, exposition and trade show industry at large. In effect, ASCAP was being asked to renegotiate its convention license agreement, and once again, ASCAP did so.

Like NAEM, all the members of the Music Licensing Task Force were members of the Convention Liaison Council when that organization rejected ASCAP's offer of industry-wide negotiations in 1988.

Negotiations for this third version of an ASCAP license agreement for sponsors of conventions, trade shows and similar events occurred during the period March through October, 1990. Throughout these negotiations, the Music Licensing Task Force was represented by Jonathan Howe, Esq., of Howe & Hutton, Ltd., Chicago, Illinois.

Significantly, and for their own reasons, NAEM would not agree to participate with the Music Licensing Task Force in negotiations with ASCAP. Therefore, to fulfill its obligations under § IV(C) of the 1950 Judgment in formulating uniform license terms for an entire industry of similarly situated users, ASCAP conducted separate negotiations with both NAEM and the Music Licensing Task Force.

The agreement negotiated in 1989 between ASCAP and NAEM and offered to event sponsors was for an initial term of one year commencing January 1, 1990, and was automatically self-renewing thereafter for additional terms of one year each unless terminated by either party. Therefore, there was no impediment to terminating the licenses granted by that agreement at the end of their initial terms and offering a new form of license agreement that might have been formulated in the interim. In any event, NAEM welcomed the opportunity to renegotiate the earlier agreement apparently because of dissatisfaction with that agreement voiced by certain NAEM members.

The final form of license agreement negotiated between ASCAP and the Music Licensing Task Force was approved and endorsed by the Task Force in November 1990. The Task Force also specifically approved the initial letter by which ASCAP offered the new license agreement to the industry, and a Questions and Answers brochure which accompanied and explained the license agreement. Copies of the ASCAP License Agreement for Conventions, Expositions, Industrial Shows, Meetings and Trade Shows, the Questions and Answers brochure and the offer letter are annexed as composite Attachment C.

Under this form of license agreement, a license fee is due for each event presented at which music is performed. The fee varies depending upon the number of people who attend each event and whether mechanical music, live music, or both mechanical and live music are performed. The Task Force requested, and

ASCAP agreed, that the fees negotiated for 1991 would apply to 1992 as well. For 1993, and each year thereafter, the license fees under the agreement would increase only to reflect increases in the Consumer Price Index.

Accordingly, for 1994, the negotiated license fees under the agreement are as follows:

-- If mechanical music is performed at any time during the event, the fee is 5.2 cents for each person who registered or paid to attend the event, but excluding those persons required to produce the event, service contract personnel, temporary personnel, accredited members of the media, and one-half of the number of persons serving as exhibitor personnel.

-- If live music is performed, there is a daily fee charged based generally on the number of persons present at the performance -- but not to exceed $580 per day. (The total license fee due for each event is the sum of the fee for mechanical music and the fee for live music.)

-- The maximum fee payable under the ASCAP license is $4,650 per event; the minimum fee is $60.

The agreement also has reporting requirements -- licensees are required to identify their events, setting forth the specific factors on which they calculated the license fees owed for each event.

The new license agreement was offered to the convention and trade show industry in early 1991, to replace the ASCAP-NAEM form of agreement. ASAE and MPI, two leading members of the

Music Licensing Task Force, provided ASCAP with copies of their membership mailing lists so that ASCAP could readily identify and offer their respective members the new license agreement.

Like NAEM before it, the Music Licensing Task Force requested that ASCAP offer an added inducement to sponsors of conventions, trade shows and similar events to enter into the new license agreement promptly. Accordingly, ASCAP agreed that for those who entered into the new license agreement on or before February 1, 1991, ASCAP, on behalf of its members, would not press claims for copyright infringement arising out of unauthorized performances of ASCAP's members' music occurring at events prior to January 1, 1991; and if such sponsors had previously signed ASCAP license agreements and paid license fees in 1989 or 1990, ASCAP would credit the license fees already paid against fees due under the new agreement for 1991.

NAEM refused to endorse the new form of license agreement for its members based on an objection to the agreement's audit provision and to inclusion of one-half of exhibitor personnel in the formula for calculating license fees due for performances of mechanical music. Nevertheless, NAEM obtained that license for the events which NAEM itself sponsors.

All the members of the Music Licensing Task Force -- including the ASAE -- have obtained that license for the events which they sponsor.

Embodied in the license agreements which evolved from all negotiations between ASCAP and convention and trade show

industry representatives was the concept that any license to be offered to event sponsors would authorize all performances presented during and as part of licensed events. All parties understood that the ASCAP license agreement would authorize performances presented directly by the event sponsor, as well as performances presented by all authorized exhibitors (including, of course, those performances presented at exhibition booths in the exhibition halls of a licensed event).

On the other hand, the industry negotiators were adamant that event sponsors were not to be held responsible for musical performances by what the industry termed "free riders" -- those not officially part of a licensed event but who may, nonetheless, set up unauthorized exhibition booths adjacent to or in the vicinity of exhibition halls where a licensed event was taking place. There was no disagreement on this point -- it was agreed that "free riders" were not participants in licensed events; that their activities were not conducted, sponsored, endorsed or approved by, or presented by or under the auspices of the event sponsor; and therefore, under the ASCAP license agreement, event sponsors are neither required to pay any license fees for performances by "free riders," nor are event sponsors liable for unauthorized performances by "free riders."

Sponsors of conventions, trade shows and similar events cannot rely on the hotels and convention centers at which their events are presented to obtain authorization for performances of ASCAP's members' music at or in conjunction with the sponsor's

convention or trade show. The ASCAP Hotels and Motels License Agreement specifically excludes from its grant authorization for performances as part of conventions, expositions, trade shows or other business presentations at the hotel.

In addition, ASCAP does not have a specific form of license agreement for convention centers. Rather, ASCAP offers convention centers those forms of ASCAP license agreements applicable to the uses they actually make. For example, if a convention center operates a music-on-hold telephone system, ASCAP will offer it an ASCAP license authorizing music-on-hold uses. If a convention center performs mechanical music through ceiling speakers in its hallways and other public areas, ASCAP will offer it a license for those uses. And, if a convention center sponsors trade shows (whether presented entirely on its own premises or at other location(s)), ASCAP would offer it the same form of license agreement ASCAP offers all other event sponsors -- a license authorizing all performances of music in the ASCAP repertory presented during and as part of the events sponsored by the convention center.

To sum up, the ASCAP license agreement for conventions, expositions, trade shows and similar events enables sponsors of such events to assure themselves and their primary customers, the exhibitors, that all performances of ASCAP music presented during and as part of the licensed event are properly authorized.

Some event sponsors now assert that exhibitors at their trade shows and conventions should be compelled to obtain author-

ization to perform music at the exhibitors' booths. Under such an approach, exhibitors who want ASCAP licenses at reasonable fees should write to ASCAP to apply for licenses and so invoke the procedure set forth in § IX of the 1950 Judgment. But, even if all exhibitors at an event sought and obtained licenses, the event sponsor still would need its own license for performances for which it is solely responsible. Surely, the convention and trade show industry's representatives had the value of a single all-inclusive license in mind when they negotiated and endorsed the current ASCAP license agreement for conventions, trade shows and similar events; and they no doubt considered that they could easily cover the cost of an ASCAP license in the rental fees charged exhibitors.

During our negotiations, the industry's representatives often stated that sponsors of conventions, trade shows and similar events always had taken the performance of music at their events for granted as "free," and that having not been asked in the past to pay for the right to perform music at their events, they would resist paying such fees now. ASCAP was prepared, therefore, to undertake a concerted educational effort to increase compliance among previously unlicensed event sponsors. Thus, ASCAP has attended, at ASCAP's own expense, every industry-sponsored forum to which we have been invited and at which we could explain the license and licensing procedures.

Despite the foregoing history demonstrating apparent hostility toward ASCAP on the part of the leaders of the conven-

tion and trade show industry, to date more than 4,200 sponsors of conventions, trade shows and similar events have obtained ASCAP licenses authorizing all performances of music in the ASCAP repertory presented during and as part of the events which they sponsor.

National Association of Exposition Managers, Inc.
719 INDIANA AVENUE • SUITE 300 • INDIANAPOLIS, INDIANA 46202-3135 • (317) 638-6236 • FAX (317) 687-0017

NAEM ENDORSES ASCAP REVISED LICENSE AGREEMENT FOR EXPOSITION INDUSTRY

FOR IMMEDIATE RELEASE: March 2, 1990

CONTACT: Donald J. Walter, CEM
NAEM Headquarters: (317) 638-6236

James Steinblatt
ASCAP Headquarters: (212) 642-3827

At a joint press conference at the Grand Hyatt Washington Hotel in Washington, D.C. on March 2, 1990, representatives of the National Association of Exposition Managers and the American Society of Composers, Authors & Publishers (ASCAP) announced that after successful negotiations, ASCAP agreed to create a new license agreement specifically for the exposition industry. NAEM spokepersons, Immediate Past President Edward P. Greeley, CEM, and Board Member Daniel J. Sladek, CEM, in a letter sent to the NAEM membership this week wrote: "NAEM acted only when it became absolutely clear that ASCAP's request for licensing agreements could be legally sustained by federal law and case precedents." The newly revised ASCAP agreement is seen as more fair and reasonable than the agreement offered in 1989.

The special task force of NAEM members consisted of Chairman Daniel J. Sladek, CEM, World of Concrete, Addison, IL; Nancy P. King, CEM, Expositions-Meetings-Conventions, Inc., McLean, VA; Gary Shapiro, Electronic Industries Association, Washington, DC; Brian E. Tully, Food Marketing Institute, Washington DC; Sheldon L London, NAEM General Counsel, Washington, DC; and, Donald J. Walter, CEM, National Association of Exposition Manager, Indianapolis, IN. ASCAP Director of Licensing L. Barry Knittel led the four person ASCAP team that included: William Lee, Project Manager; Dr. Peter Boyle, Chief Economist; and, Bennet Lincoff, Esquire.

The new agreement bases the licensing fee per exposition on the number of "attendees" at the exposition, and the fee is further based upon whether the music is performed live or by mechanical means. Under the new license there is now a $100 minimum fee and a maximum of $4,000 per exposition. Additionally, in an effort to encourage live performances, the maximum daily fee for live music is $500 and scales downward to $25 when there are fewer than 250 persons present.

ASCAP has agreed that with the new contract there will be no retroactive assessments for any event prior to January 1, 1990, for those who sign the new agreement now. For those firms which signed an agreement and made payments in 1989, a full credit will be extended against 1990 or future liability.

ASCAP's Knittel who in his 19 years with ASCAP has negotiated a number of license agreements with industry groups called the NAEM/ASCAP talks "among the toughest I have been through, and, to my mind, a good deal for both organizations because neither party is completely happy with the results."

NAEM is making a special mailing to the membership to advise them of this action. The packet of material includes a detailed Q. and A. covering the new license agreement, two copies of the ASCAP contract, an ASCAP brochure, and a transmittal letter from Mr. Greeley and Mr. Sladek.

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National Association of Exposition Managers, Inc.
719 INDIANA AVENUE • SUITE 300 • INDIANAPOLIS, INDIANA 46202-3135 • (317) 638-6236 • FAX (317) 687-0017

March 2, 1990

Dear NAEM Member:

We are pleased to advise you that NAEM has successfully concluded negotiations with the American Society of Composers, Authors & Publishers (ASCAP), and, as a result, ASCAP has developed an all new license for the exposition industry that, in our opinion, is more fair and more reasonable than the license offered in 1989.

NAEM acted only when it became absolutely clear that ASCAP's request for a license could be legally sustained by federal law and case precedents. On this point, we concluded that U.S. copyright laws cover the use of music at our expositions. Whether it is the music at a general session, a jazz band at a ribbon cutting, an annual dinner dance, or simply the musical background on a video player in an exhibitor's booth, these are all protected uses of music for which a license is required.

As the NAEM President, who appointed a task force to negotiate with ASCAP and the Chairman of the Task Force, the undersigned, want you, our valued member, to know what this ASCAP license is all about. To that end, the enclosed packet of material contains the following:

1. Two copies of the newly revised ASCAP Exposition License
2. ASCAP Exposition Report Form
3. An ASCAP Brochure describing the organization and how the license works.
4. An NAEM and ASCAP-produced Q. and A. explaining the license.
5. A joint NAEM-ASCAP Press Release

An integral part of the negotiations has been the ASCAP agreement to make no retroactive assessments for any event prior to January 1, 1990. For those exposition firms who signed an agreement in 1989, and made payments to ASCAP, any amounts paid will be credited toward any future liability. In effect, the only liability is for 1990 and future years; provided that you sign the enclosed license agreement now.

We know that any new cost of producing an exposition is a legitimate concern; therefore, we hope that you will familiarize yourself with the enclosed material. We trust it will answer your questions. We at NAEM will do all in our power over the coming year to explain the music licensing agreements, and in the meantime, we hope that you won't hesitate to call or to write our Indianapolis office with your questions. We want to help.

Sincerely yours,

Edward P. Greeley, CEM
Immediate Past President

Daniel J. Sladek, CEM
Board of Director

SALES DEPT MAR 5 - 1990 5-1

LICENSE AGREEMENT–CONVENTIONS, EXPOSITIONS, INDUSTRIAL SHOWS, MEETINGS AND TRADE SHOWS

Agreement between the AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS ("SOCIETY"), located at One Lincoln Plaza, New York, New York 10023 and

("LICENSEE"), located at as follows:

1. **Grant and Term of License**

(a) SOCIETY grants and LICENSEE accepts for a term commencing and ending December 31, 1994, and continuing thereafter for additional terms of one year each unless terminated by either party as provided in this Agreement, a license to perform publicly or cause to be performed publicly, in the United States, its territories and possessions, at "functions" presented in conjunction with each LICENSEE "event" and not elsewhere, non-dramatic renditions of the separate musical compositions now or hereafter during the term of this Agreement in the repertory of SOCIETY, and of which SOCIETY shall have the right to license such performing rights. The term "event" as used in this Agreement shall mean a conference, congress, convention, exposition, industrial show, institute, meeting, seminar, teleconference, trade show or other similar scheduled activity of LICENSEE of not more than fourteen days duration.

The term "function" as used in this Agreement shall mean any activity conducted, sponsored, endorsed or approved by, or presented by or under the auspices of LICENSEE as part of or in conjunction with any LICENSEE event which is open only to "attendees."

The term "attendees," as used in this Agreement, shall mean all individuals who register or pay to attend a LICENSEE event.

(b) This Agreement shall enure to the benefit of and shall be binding upon the parties hereto and their respective successors and assigns, but no assignment shall relieve the parties hereto of their respective obligations under this Agreement as to performances rendered, acts done and obligations incurred prior to the effective date of the assignment.

(c) Either party may, on or before ninety days prior to the end of the initial term or on or before thirty days prior to the end of any renewal term, give written notice of termination to the other. If such notice is given, the license shall terminate on the last day of such initial or renewal term.

2. **Limitations on License**

(a) This license is not assignable or transferable by operation of law, devolution or otherwise, except as provided in Paragraph "1(b)," and is limited strictly to the LICENSEE, to LICENSEE's event(s) and to the "premises" where each function shall be presented. The term "premises" as used in this Agreement, shall mean all locations used for functions at LICENSEE's events.

(b) This license does not authorize the broadcasting, telecasting or transmission by wire or otherwise, of renditions of musical compositions in SOCIETY's repertory to persons outside of the premises where each function shall be presented. Nothing in this Paragraph "2(b)" shall be deemed to limit LICENSEE's right to transmit renditions of musical compositions in SOCIETY's repertory to attendees in connection with teleconferences pursuant to Paragraph "1(a)" of this Agreement.

(c) This license shall be limited to performances of music during functions conducted, sponsored, endorsed or approved by, or presented by or under the auspices of LICENSEE as part of or in conjunction with LICENSEE's events which are open only to attendees.

(d) This license is limited to non-dramatic performances, and does not authorize any dramatic performances. For purposes of this Agreement, a dramatic performance shall include, but not be limited to, the following:

(i) performance of a "dramatico-musical work" in its entirety;

(ii) performance of one or more musical compositions from a "dramatico-musical work" accompanied by dialogue, pantomime, dance, stage action, or visual representation of the work from which the music is taken;

(iii) performance of one or more musical compositions as part of a story or plot, whether accompanied or unaccompanied by dialogue, pantomime, dance, stage action, or visual representation;

(iv) performance of a concert version of a "dramatico-musical work."

The term "dramatico-musical work" as used in this Agreement, shall include, but not be limited to, a musical comedy, opera, play with music, revue, or ballet.

3. **License Fees**

In consideration of the license granted in this Agreement, LICENSEE agrees to pay SOCIETY the applicable license fee for each event as set forth in the rate schedule attached to and made a part of this Agreement based on "LICENSEE's Operating Policy." The term "LICENSEE's Operating Policy," as used in this Agreement, shall mean all of the factors which determine the license fee applicable to each event under the attached rate schedule.

4. **Reports of Events and Payment of License Fees**

(a) If LICENSEE presents four or fewer events per year, LICENSEE shall submit to SOCIETY, no later than thirty days after the presentation of each event:

(i) written notice of the event, on forms supplied free of charge by SOCIETY, stating the date of the event, the address of the premises and the LICENSEE's Operating Policy; and

(ii) payment of the applicable license fee.

(b) If LICENSEE presents five or more events per year, LICENSEE shall submit to SOCIETY no later than January 31, April 30, July 31 and October 31 of each year:

(i) written notice of each event presented during the preceding calendar quarter, on forms supplied free of charge by SOCIETY, stating the date of the event, the address of the premises and the LICENSEE's Operating Policy for each event; and

(ii) payment of the applicable license fee for all events presented during the preceding calendar quarter.

(c) SOCIETY shall have the right, by its authorized representatives, at any time during customary business hours, and upon thirty days written notice, to examine the books and records of account of LICENSEE to such extent as may be necessary to verify any statements of LICENSEE's Operating Policy rendered pursuant to this Agreement.

(d) SOCIETY shall consider all data and information coming to its attention as the result of the submission of statements of LICENSEE's Operating Policy or as the result of any examination of LICENSEE's books and records hereunder as completely and entirely confidential.

(e) In the event LICENSEE shall fail to pay any license fees when due to SOCIETY, LICENSEE shall pay a finance charge on the license fees due of 1½% per month, or the maximum rate permitted by law, whichever is less, from the date such license fees should have been paid.

(f) In the event that LICENSEE's payment of fees under this Agreement causes SOCIETY to incur a liability to pay a gross receipts, sales, use, business use, or other tax which is based on the amount of SOCIETY's receipts from LICENSEE, the number of licensees of SOCIETY, or any similar measure of SOCIETY's activities, and (i) SOCIETY has taken reasonable steps to be exempted or excused from paying such tax; and (ii) SOCIETY is permitted by law to pass through such tax to its licensees, LICENSEE shall pay to SOCIETY the full amount of such tax.

5. **Breach or Default**

Upon any breach or default by LICENSEE of any term or condition herein contained, SOCIETY may terminate this license by giving LICENSEE thirty days written notice to cure such breach or default, and in the event that such breach or default has not been cured within said thirty days, this license shall terminate on the expiration of such thirty-day period without further notice from SOCIETY.

6. **Interference With SOCIETY's Operations**

In the event of:

(a) any major interference with the operations of SOCIETY in the state, territory, dependency, possession or political subdivision in which LICENSEE is located, by reason of any law of such state, territory, dependency, possession or political subdivision; or

(b) any substantial increase in the cost to the SOCIETY of operating in such state, territory, dependency, possession, or political subdivision, by reason of any law of such state, territory, dependency, possession or political subdivision, which is applicable to the licensing of performing rights,

SOCIETY shall have the right to terminate this Agreement forthwith by thirty days written notice, and shall refund to LICENSEE any unearned license fees paid in advance.

7. **Notices**

All notices required or permitted hereunder shall be given in writing by certified United States mail sent to either party at the address stated above. Each party agrees to inform the other of any change of address.

In WITNESS WHEREOF, this Agreement has been duly executed by SOCIETY and LICENSEE this _____ day of _____ 19 .

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

By _____

_____
TITLE

_____
LICENSEE

By _____

_____
TITLE

(Fill in capacity in which signed:
(a) If corporation, state corporate office held; (b) If partnership, write word "partner" under signature of signing partner; (c) If individual owner, write "individual owner" under signature.)

RATE SCHEDULE–CONVENTIONS, EXPOSITIONS, INDUSTRIAL SHOWS, MEETINGS AND TRADE SHOWS

For purposes of computing license fees under this Rate Schedule, the number of Attendees shall include all persons who have registered or paid to attend LICENSEE's event, but shall exclude those persons required to produce LICENSEE's event, service contract personnel, temporary personnel, accredited members of the media, and one-half of the number of persons serving as exhibitor personnel.

Fees Per Event For Calendar Years 1991 and 1992

1. If "mechanical music" is performed, the fee shall be $.045 times the number of Attendees per event, based on the greater of the number of "Attendees" reported by LICENSEE to SOCIETY pursuant to this Agreement or the number as reported in Tradeshow Week Data Book published by Tradeshow Week or any other publication. The term "mechanical music" shall mean music presented by means other than live musicians, e.g., records or tapes.

2. If live music is performed, the daily fee shall be the aggregate total applicable fee calculated in accordance with Subparagraphs 2(a) and 2(b) of this Rate Schedule, provided, however, that the aggregate fee for live music shall not exceed $500 per day.

   (a) If live music is performed in the main meeting room or on any exhibition floor at LICENSEE's event, the daily fee shall be:

Number of Attendees	Daily Live Music Fee
250 or less	$ 25
251- 500	50
501- 750	75
751- 1,000	100
1,001- 1,500	125
1,501- 2,000	150
2,001- 3,000	200
3,001- 4,000	250
4,001- 5,000	300
5,001- 7,500	350
7,501- 10,000	400
10,001 or more	500

   (b) If live music is performed at function(s) occurring elsewhere than in the main meeting room or on an exhibition floor of LICENSEE's event, the fee shall be as shown in Subparagraph 2(a) of this Rate Schedule, provided that the number of Attendees for these function(s) shall be the aggregate number of persons for whom the rooms or areas in which such function(s) occur are set up, or, if the rooms or areas are not set up for specific numbers of persons, the fire capacity of such rooms or areas.

3. If both mechanical and live music are performed at LICENSEE's event, the fee shall be the total applicable fees for mechanical and live music, in accordance with Paragraphs 1, 2(a) and 2(b) of this Rate Schedule.

4. The minimum fee payable hereunder shall be $50 per event and the maximum fee payable hereunder shall be $4,000 per event, provided, however, that if neither live music nor mechanical music is performed at an event, then no fee shall be payable under this Agreement for such event.

Fees Per Event For Calendar Year 1993 and Thereafter

1. For calendar year 1993 and each calendar year thereafter, the license fees shall be the license fees for 1992, adjusted in accordance with any increase in the Consumer Price Index (National, all items) between October 1989 and the October preceding the calendar year in question.

2. Such adjustments to license fees shall be rounded as follows:

   (a) For mechanical music, to the nearest one-half cent;

   (b) For live music, to the nearest $5.00;

   (c) For the minimum fee payable, to the nearest $10.00; and

   (d) For the maximum fee payable, to the nearest $50.00.

DRAFT LETTER TO NAEM MEMBERS WHO WERE NOT LICENSED
UNDER THE ASCAP EXPOSITION LICENSE AGREEMEMT

October 24, 1990

Dear NAEM Member:

ASCAP is pleased to inform you that it has reached an agreement with major trade associations in your industry, including ASAE, MPI, PCMA and RCMA on a new form of ASCAP license agreement for sponsors of conventions, expositions, industrial shows, meetings, trade shows and similar events. This license, effective as of January 1, 1991, will authorize you to perform copyrighted music in the ASCAP repertory at all of your events. Copies of the new agreement are enclosed.

Under the United States Copyright Law, public performances of copyrighted musical works, including performances during a convention, exposition, industrial show, meeting, trade show or similar event, require a license from the copyright owners of the musical works performed or their representative. As the organizer of the event, it is your legal responsibility to obtain these rights. By entering into an ASCAP license, you will be licensed for non-dramatic performances of all of the copyrighted musical works in our repertory, including performances at functions such as banquets and by your event's exhibitors.

If you wish, you may obtain an individual license directly from each copyright owner whose works you wish to perform. However, an ASCAP license enables you to perform all works of all ASCAP members, as well as music in the repertories

of affiliated foreign performing rights societies. Hundreds of thousands of music users have considered the alternatives, and chosen ASCAP licenses. By doing so, they know that they will not be violating the Copyright Law, even unintentionally.

To tell you more about ASCAP and the new ASCAP license agreement, we are enclosing a Question & Answer brochure which contains important information.

Please sign and return both copies of the agreement. We will then forward an executed copy of the agreement with a supply of report forms.

IMPORTANT -- AMNESTY OFFER: Even though you were not licensed pursuant to ASCAP's prior Exposition license agreement, we are offering this special incentive: If you sign and return the new license agreement by February 1, 1991, ASCAP, on behalf of its members, will not pursue infringement claims for unauthorized musical performances occurring at your events prior to January 1, 1991.

Should you have any questions concerning this matter, please feel free to contact us at our toll free number: 1-800-627-9805.

Sincerely,

L. BARRY KNITTEL

ASCAP'S LICENSING OF "RELIGIOUS" RADIO BROADCASTERS

In 1977, four owners of radio stations employing "religious broadcasting" formats filed a class action antitrust lawsuit against ASCAP. the action was filed at a time when ASCAP and BMI were losers in another antitrust case, CBS v. ASCAP and BMI, a decision that was ultimately reversed by the United States Supreme Court in its landmark ruling in Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979). The religious broadcasters' antitrust action, Alton Rainbow Corp. v. ASCAP, alleged that the ASCAP blanket license violated the antitrust laws.

Alton Rainbow remained pending until the parties reached settlement in June, 1984, as a result of which the stations paid a substantial sum to ASCAP. The settlement applied as well to all members of the plaintiff class, defined as "all radio stations which devote 25% or more of their broadcasting day to programs originated by recognized non-profit religious organizations, churches, Bible institutes and ministers of the Gospel; sermons, theological discussions, in which the religious message or theology is the main purpose." It should be emphasized, however, that not all "religious" broadcasters -- members of the Alton Rainbow plaintiff class as well as those operating today -- are themselves non-profit organizations. To the contrary, many are simply commercial business entities who know that the religious programming format can result in a very

profitable bottom line.[1]

At the same time the Alton Rainbow antitrust action was settled, the owners of 21 radio stations applied to ASCAP for licenses under the Amended Final Judgment in United States v. ASCAP. This was significant because, during the pendency of the Alton Rainbow litigation, the religious broadcasters had held to the view that they could freely perform ASCAP's members' copyrighted music. That piratical conduct precipitated dozens of copyright infringement actions against religious broadcasters throughout the country, resulting in the broadcasters being held to be willful copyright infringers.

In their application, the stations asked ASCAP to quote fees for ASCAP's two forms of licenses, the blanket and per program license prescribed to be made available for broadcasters by the Amended Final Judgment. Of course, ASCAP has always had available to broadcasters these tow forms of license: under a blanket license, a radio station pays ASCAP a small percentage of its gross revenues less certain specified deductions; under the per program license, the fee is related to revenues generated from programs using ASCAP music.

Early on in the negotiations between ASCAP and the religious broadcasters, the stations focused on the non-profit nature of the suppliers of many of the programs they broadcast,

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[1] A recent article in the New York Times reports that "religious programming is the third most common radio format in the country." "Christian Radio Stations, Riding a Wave of Change, Keep Their Popularity," January 10, 1994.

and sought a reduction in both blanket and per program fees which had been negotiated on an industry-wide basis. ASCAP has consistently rejected that approach -- to the extent that the stations themselves are commercial enterprises, it is unfair to permit them to exclude from their fee calculation revenue obtained from any source when other commercial stations must pay fees computed on the basis of all of their revenues. Moreover, it would be inequitable to single out copyright owners among all other suppliers of goods and services to commercial radio stations for such treatment.

Just as important from ASCAP's point of view has been this obvious proposition: because the Amended Final Judgment in United States v. ASCAP requires that ASCAP avoid discrimination in the license fees and other terms and conditions of its licenses among similarly situated licensees, it is imperative that all commercial radio broadcasters be offered the same forms of blanket and per program licenses. In 1978, 1986 and 1991, ASCAP and committees of radio broadcasters purporting to represent the entire industry reached agreement on uniform blanket and per program licenses for all commercial radio stations. These forms of agreement were submitted to the United States District Court for the Southern District of New York in separate proceedings under the Amended Final Judgment with the result that the fee provisions were approved as reasonable and nondiscriminatory for the applicant stations. The court-approved licenses were accepted by many thousands of radio broadcasters,

including many employing religious program formats.[2]

ASCAP and the All-Industry Radio Music License Committee (now known as the Radio Music License Committee) most recently negotiated new blanket and per program license terms in 1991. While those negotiations were being carried out, the religious broadcasters commenced a second proceeding under the Amended Final Judgment. Both of their proceedings have since been consolidated and remain pending.

Over the past three years, counsel for the religious broadcasters have engaged in large-scale discovery, a costly and time-consuming process for ASCAP. Over 10,000 documents have been produced and the applicants' counsel has now begun taking depositions of ASCAP employees. The litigation process being what it is, it is too early to anticipate when these proceedings will end. The Court will hear their arguments and ours, and decide the matter.

Thus, it is up to ASCAP to persuade the Court that the fees it is proposing are reasonable. This is, after all, what users are entitled to, as required by the Amended Final Judgment -- that music in the ASCAP repertory should be available for use by all music users upon payment of reasonable license fees, and that a neutral third party -- the Court -- will decide what is reasonable in the absence of agreement.

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[2] Indeed, some of the stations that signed the forms of blanket and per program licenses approved by the Court in 1986 were also participants in the proceeding commenced by the religious broadcasters in the wake of the Alton Rainbow settlement. As a result, the Court ordered dismissal of these stations' applications from the religious broadcasters' proceeding. The Court noted that "ASCAP did not seek to impose unprecedented fees but merely sought to assess the same charges approved by this Court in the [All-Industry Committee's] proceedings."

ascap

American Society of Composers, Authors & Publishers

QUESTIONS AND ANSWERS ABOUT THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS (ASCAP) LICENSE AGREEMENT FOR CONVENTIONS, EXPOSITIONS, INDUSTRIAL SHOWS, MEETINGS AND TRADE SHOWS

American Society of Composers, Authors and Publishers
One Lincoln Plaza, New York, N.Y. 10023
Area Code (212) 621-6400
Fax (212) 873-3133
Toll Free 1-800-627-9805

1 Why must we obtain permission for the public performance of copyrighted music at our conventions, expositions, industrial shows, meetings, trade shows and other similar events?
2 Why are the musicians, entertainers or exhibitors at our events not responsible for obtaining permission?
3 What is ASCAP?
4 Who does ASCAP license?
5 What kind of music does an ASCAP license allow us to perform at our events?
6 Why is my organization being contacted by ASCAP now?
7 What does the ASCAP license do for us?
8 What is the cost of the ASCAP license?
9 How do we calculate the fee due ASCAP?
10 How do we calculate the fee for mechanical music?
11 How do we calculate the fee for live music?
12 How do we calculate the fee for live performances in the main meeting room or on any exhibition floor?
13 How do we calculate the fee for live performances at other functions?
14 Can you give specific examples of fee calculations?
15 Is there a maximum license fee per event?
16 Is there a minimum license fee per event?
17 What will ASCAP's license fees be in the future?
18 How do we report to and pay ASCAP if we present four or fewer events per year?
19 How do we report to and pay ASCAP if we present five or more events per year?
20 Are we liable for performances of music in the ASCAP repertory at events held prior to January 1, 1991?
21 What if we paid license fees under the ASCAP EXPOSITIONS or CONVENTIONS, INDUSTRIAL SHOWS AND TRADE SHOWS license agreements for events which occurred in 1989 or 19
22 Must we sign the form of ASCAP license agreement you are recommending?
23 What happens if we don't take an ASCAP license?
24 How do we obtain an ASCAP license?
25 What if we have any further questions?

1. Q. ***Why must we obtain permission for the public performance of copyrighted music at our conventions, expositions, industrial shows, meetings, trade shows and other similar events?***

A. The United States Copyright Law requires it. Generally, under the Copyright Law, Title 17 of the United States Code, the public performance of copyrighted music requires permission from the copyright owner or its licensing agent, such as ASCAP. Just as you pay for use of other forms of property, you must pay for the use of musical property.

2. Q. ***Why are the musicians, entertainers or exhibitors at our events not responsible for obtaining permission?***

A. Some people mistakenly assume that musicians and entertainers must obtain all licenses needed for their performances, or that they can shift liability for unauthorized performances to exhibitors. This is not the law. The organization primarily responsible for the event itself is obligated to obtain permission to publicly perform copyrighted music at conventions and similar events.

3. Q. ***What is ASCAP?***

A. ASCAP is the oldest and foremost organization in the United States which licenses the right to perform publicly copyrighted musical compositions. Founded in 1914 by Victor Herbert, Irving Berlin, and other leading American composers and publishers, ASCAP is an unincorporated membership association of writers and publishers of music. It is the only American performing rights organization wholly owned and managed by and for writers and publishers of music.

Each of ASCAP's more than 45,000 members has granted to ASCAP a nonexclusive right to license the non-dramatic public performances of their copyrighted musical compositions. On behalf of all of its members, ASCAP licenses the right to perform publicly all of the copyrighted musical works in the ASCAP repertory. ASCAP collects license fees, and distributes those fees to its members after deducting its operating costs and payments to affiliated foreign societies—more than 80 cents of each dollar ASCAP collects goes to writers and music publishers. Indeed, license fees for public performances are the largest single source of income for most composers and songwriters.

4. Q. *Who does ASCAP license?*

A. ASCAP licenses tens of thousands of music users such as radio and television networks and stations, restaurants, nightclubs, hotels, shopping malls, fairs, dance schools, concert promoters and others who desire to perform lawfully the copyrighted musical compositions in the ASCAP repertory.

While any music user could obtain individual licenses from each ASCAP member whose works are performed, one ASCAP license enables you to perform all works of all ASCAP members (and members of affiliated foreign societies) without complex record-keeping. The ASCAP blanket license provides an easy, economical means by which you may gain access to the vast ASCAP repertory.

5. Q. *What kind of music does an ASCAP license allow us to perform at our events?*

A. ASCAP's repertory contains music of every form and style: big band music, rock, pop, country, Broadway, film and television, gospel, jazz, Latin, soul, symphony and concert music. The ASCAP membership list reads like a Who's Who of American music, including Irving Berlin, Johnny Cash, Neil Diamond, Bob Dylan, Duke Ellington, George and Ira Gershwin, Madonna, Henry Mancini, Smokey Robinson, Richard Rodgers, Kenny Rogers, Bruce Springsteen, Randy Travis, and Stevie Wonder, among many others. An ASCAP license also covers the works of tens of thousands of foreign writers and publishers, members of over 40 affiliated foreign performing rights societies.

If you wish to obtain a membership list from ASCAP, or to know if particular compositions are in the ASCAP repertory, you need only write and ASCAP will respond promptly.

6. Q. *Why is my organization being contacted by ASCAP now?*

A. In 1989 and 1990, ASCAP met with representatives of various industry associations and groups in an effort to formulate an appropriate industry-wide license agreement for conventions, expositions, industrial shows, meetings, trade shows and similar events. The ASCAP license agreement being offered to you today results from months of negotiations and has been endorsed and is recommended by the leading associations in your industry, including ASAE, MPI, PCMA and RCMA as being fair and reasonable.

7. Q. *What does the ASCAP license do for us?*

A. The ASCAP license authorizes the non-dramatic public performance of music in the ASCAP repertory at functions presented in conjunction with events such as conferences, congresses, conventions, expositions, industrial shows, institutes, meetings, seminars, teleconferences, trade shows or other similar scheduled activities of not more than fourteen days duration.

The ASCAP license authorizes live performances as well as mechanical performances (such as by records, tapes, compact discs, radio over loudspeakers, or by audio-visual means such as television, video-cassettes or laser discs). Thus, for example, your ASCAP license authorizes the performance of live music on the convention or exhibition floor, the performance of recorded music as part of the soundtrack of a videotape shown by one of your exhibitors or by a speaker at a meeting, the performance of music as part of a teleconference, as well as the performance of recorded music by a disc jockey at a dinner dance, and live music by a band at an opening, closing or awards ceremony.

8. Q. *What is the cost of the ASCAP license?*

A. A license fee will be due for each convention, exposition, industrial show, meeting or trade show you present. The fee under your ASCAP license will vary depending upon the number of people who attend each event and whether mechanical music, live music, or both mechanical and live music are performed.

9. Q. *How do we calculate the fee due ASCAP?*

A. In order to calculate the total fee due for each event, first determine the fee for mechanical music, then the fee for live music, and add them together.

10. Q. *How do we calculate the fee for mechanical music?*

A. If mechanical music is performed at any time during your event, the fee is 4½¢ per "attendee." The term "attendee" means all persons who have registered or paid to attend the event, but excludes those persons required to produce the event, service contract personnel, temporary personnel, accredited members of the media, and one-half of the number of persons serving as exhibitor personnel.

11. Q. *How do we calculate the fee for live music?*

A. If live music is performed, there is a daily fee charged which shall not exceed $500 per day. In order to calculate the daily fee for live music, first determine the fee for live performances in the main meeting room or on any exhibition floor, then determine the fee for live performances occurring elsewhere than in the main meeting room or on any exhibition floor, and add them together.

12. Q. *How do we calculate the fee for live performances in the main meeting room or on any exhibition floor?*

A. If live music is performed in the main meeting room or on any exhibition floor at the event, the daily fee is as shown in the following table:

Number of Attendees	Daily Live Music Fee
250 or less	$ 25
251- 500	50
501- 750	75
751- 1,000	100
1,001- 1,500	125
1,501- 2,000	150
2,001- 3,000	200
3,001- 4,000	250
4,001- 5,000	300
5,001- 7,500	350
7,501- 10,000	400
10,001 or more	500

13. Q. *How do we calculate the fee for live performances at other functions?*

A. If live music is performed at functions occurring elsewhere than in the main meeting room or on an exhibition floor, the fee shall be as shown in the table set forth above, provided that the number of attendees for these functions shall be the total number of persons for whom the rooms or areas in which such functions occur are set up, or, if the rooms or areas are not set up for specific numbers of persons, the fire capacity of such rooms or areas.

14 Q. *Can you give specific examples of fee calculations?*

A. In the following examples, we assume that 1,500 persons paid or registered to attend the event and that there were also 300 exhibitor personnel present. Because one half the number of exhibitor personnel are counted as "attendees," the total number of "attendees" in these examples is 1,650.

Example I: Mechanical music is performed each day of the event by exhibitors on the trade show floor, during a seminar in a meeting room, and at an awards banquet; no live music is performed at the event. The license fee for the event is:

1,650 (number of attendees)
× 4½¢ (mechanical music fee)
$74.25

Example II: Live music is performed on the main exhibition floor during two days of the event; no other live music and no mechanical music is performed at the event. The license fee for the event is:

$150 (daily fee for live music performed on the main exhibition floor with 1,650 attendees)
× 2 days
$300

Example III: Live music is performed on the main exhibition floor during two days of the event, and, on each of those same two days live music is also performed at a dinner party with a set up for 350 persons; no other live music and no mechanical music is performed at the event. The license fee for the event is $400 calculated as follows:

$150 (daily fee for live music performed on the main exhibition floor with 1,650 attendees)
× 2 days
$300
plus
$50 (daily fee for live music performed at functions occurring elsewhere than on the main exhibition floor (the dinner parties) with 350 attendees)
× 2 days
$100

The total license fee for this event is $400.

Example IV: Mechanical music is performed each day of the event by exhibitors on the trade show floor during a seminar in a meeting room and at an awards banquet; live music is performed on the main exhibition floor during two days of the event; and on each of those same two days live music is also performed at three separate functions all of which occur elsewhere than on the main meeting floor and which have set ups for 250 persons, 850 persons, and 50 persons, respectively; no other mechanical or live music is performed at the event. The license fee for the event is $624.25, calculated as follows:

1,650 (number of attendees)
× 4½¢ (mechanical music fee)
$74.25
plus
$150 (daily fee for live music performed on the main exhibition floor with 1,650 attendees)
× 2 days
$300
plus
$125 (daily fee for live music occurring at functions elsewhere than on the main exhibition floor with a total of 1,150 attendees)
× 2 days
$250

The total license fee for this event is $624.25.

16. Q. *Is there a maximum license fee per event?*

A. Yes. The maximum fee payable under the ASCAP license is $4,000 per event.

18. Q. *Is there a minimum license fee per event?*

A. Yes. The minimum fee payable under the ASCAP license is $50 per event. However, if neither live music nor mechanical music is performed at an event, then no fee shall be payable under the ASCAP license for that particular event.

17. Q. *What will ASCAP's license fees be in the future?*

A. The license fees discussed in this pamphlet are applicable for each event presented during calendar years 1991 and 1992. After 1992, all license fees under the ASCAP license agreement are subject to adjustment in accordance with changes in the Consumer Price Index.

18. Q. *How do we report to and pay ASCAP if we present only four or fewer events per year?*

A. If you present four or fewer events per year, you must complete and return a report form to ASCAP no later than thirty days after the presentation of each such event together with payment of the applicable license fee. ASCAP will provide you with report forms free of charge.

19. Q. *How do we report to and pay ASCAP if we present five or more events per year?*

A. If you present five or more events per year, you must complete and return report forms to ASCAP quarterly (by January 31, April 30, July 31 and October 31), specifying each event presented during the preceding calendar quarter. At that time, you must also pay the applicable license fee for all events presented during the preceding calendar quarter.

20. Q. *Are we liable for performances of music in the ASCAP repertory at events held prior to January 1, 1991?*

A. Yes. However, for those who enter into the new ASCAP license agreement on or before February 1, 1991, ASCAP, on behalf of its members, has agreed not to press claims for the unauthorized public performance of ASCAP's members' music occurring at conventions, expositions, industrial shows, meetings and trade shows prior to January 1, 1991.

21. Q. *What if we paid license fees under the ASCAP EXPOSITIONS or CONVENTIONS, INDUSTRIAL SHOWS AND TRADE SHOWS license agreements for events which occurred in 1989 or 1990?*

A. Provided that you enter into the new ASCAP license agreement on or before February 1, 1991, ASCAP has agreed to apply all such license fees as a credit toward fees you may owe under the new ASCAP license agreement in 1991.

22. Q. *Must we sign the form of ASCAP license agreement you are recommending?*

A. To perform copyrighted music lawfully, a license is required. A license may be obtained directly from the copyright owners of the works, or, for works in the ASCAP repertory, from ASCAP. If you are performing music in the ASCAP repertory and you believe that the agreement ASCAP offers does not fit your needs because your performances of music are very different from other conventions, expositions, industrial shows, meetings and trade shows, you have the right to apply to the United States District Court for the Southern District of New York to determine a reasonable license fee.

23. Q. *What happens if*
license?

A. If you do not obtain
from the individual ASCAP
perform) your association
sible for any unauthorized p
musical compositions in the
copyright infringers. The Co
injunction against further
each copyright infringed wo
plus a reasonable attorney's

Obviously, it is far less ex
copyright law by taking an
damages for violating the

24. Q. *How do we obtain*

A. Complete and sign
license agreement include
to ASCAP, National Sales
New York, New York 10023
return one fully executed co
to you for your files.

25. Q. *What if we have a*

A. If you have any ques
license agreement or you
United States Copyright La
ic at your events, please fe
its toll-free number set up s
positions, industrial shows
1-800-627-9805.

ASCAP THE VI

Mr. HUGHES. Mr. Berenson, please proceed.

STATEMENT OF MARVIN L. BERENSON, VICE PRESIDENT AND GENERAL COUNSEL, BROADCAST MUSIC, INC. (BMI)

Mr. BERENSON. Mr. Chairman, members of the subcommittee, my name is Marvin Berenson. I am general counsel for Broadcast Music, Inc., commonly referred to as BMI, a not-for-profit making U.S. performing rights organization representing approximately 150,000 songwriters and composers as well as 50,000 music publishers.

Founded over 50 years ago, BMI was established to be a competitive source of music licensing. BMI immediately established what is referred to as an "open door policy" so that alternative genres of music, such as jazz, gospel, country, R&B, and many others could be legally available to music users.

Today, BMI represents a repertoire of over 2½ million musical works. Under the U.S. copyright law, if a person wishes to publicly perform a copyrighted musical composition, that person must obtain permission, in effect, a license from the creators of that musical composition.

As most songwriters would find it impossible to track and license all performances of their works, they enter into agreements with a performing rights organization, and grant to the organization a nonexclusive right of public performance.

Without organizations such as BMI, ASCAP, and SESAC, a user would be compelled to seek out every copyright owner whose music he or she is publicly performing in order to obtain permission for such performances.

No one can deny that music is pervasive in the American lifestyle. It is used in many ways and places: at home, in a car, an office, a retail business, restaurants, TV, cable television, movies, just to name a few. It is so readily available, that many people tend to think it is free, and they believe that they have the right to use music as they please. It is not scrambled like cable television networks; it is not something like Coca-Cola where the formula is secret.

Practically, music can be publicly performed without obtaining the mandated prior permission from a copyright owner. Property rights in an intangible such as music are often difficult to comprehend. People may assume that because music comes from a radio or television or record or tape that they have purchased, it is theirs to do with as they wish.

Although the copyright acts grants them exclusive rights that date back many decades, BMI and its sister performing rights organizations spend countless hours educating music users both as to the concept of copyright and the statute which confirms it. Even then people do not believe that they must pay for publicly performing music, although they may admit that it is someone else's property.

With the enactment of the 1976 Copyright Act, Congress made clear its intent to limit any exemption under section 110(5) to small commercial establishments, namely what has been referred to as "mom and pop" type businesses. For a detailed discussion, please refer to the text of my statement.

H.R. 3288 would deprive copyright owners of that which Congress long ago determined was theirs to receive. By greatly expanding the situations under which music can be used without compensation to its owners, this bill would make music a commodity that its creators would be compelled to donate free of charge to owners of restaurants and like establishments for use of their commercial benefit.

To say that music used by such establishments is incidental to the establishments main purpose is to fail to recognize what Supreme Court Justice Oliver Wendell Holmes stated over 75 years ago. That is, if music did not pay, it would be given up.

When a business offers something to its patrons, it is obviously thought to be good for business. When a radio or television is turned on in a restaurant, it has economic value to the proprietor. The people who created and own the music emanating from those devices, should not—and I repeat—should not be forced by statute to contribute their property, that is, their musical compositions, when no one else providing value to the business is asked to do the same.

Without BMI's efforts, the musical creations we can hear with a push of a button would otherwise go uncompensated. If that were to happen, the incentive for a composer to continue at his or her livelihood would disappear, leaving society all the poorer.

Regarding BMI's licensing practices, I will try to summarize our approach. Through advertising, telemarketing, videos, participation in industrywide seminars, working with the National Council of Better Business Bureaus, direct mail and personal visits, BMI representatives do their utmost to build relationships and to educate the business community about licenses for those wishing to use music in our repertoire.

BMI has and offers to a music user specific brochures which educate, and I have copies of these available for any member of the subcommittee who may desire them. Additionally, BMI has an 800 telephone number for inquiries from prospective licensees.

Most people are receptive to our contacts. That is because our licensing executives' contacts and presentations must follow the same philosophy as is apparent from our printed materials. We must educate and inform in a professional and cordial manner. We do not intimidate, we do not harass, we do not abuse.

If we were informed of any such conduct by a BMI representative, BMI immediately and thoroughly investigates the claim, and appropriate action is taken if necessary. Happily, instances of such claims have been far and few between, and, to the best of our knowledge, have always been satisfactorily resolved.

If the committee has any specific information with regard to unacceptable conduct by BMI representatives, we would appreciate receiving the specifics so we can look into such claims.

The heart of the matter is that performing rights organizations are implementing the law and it is difficult to explain our function without specifically referring to that law. The fact is that no fence can be put around the public performance of our music. Given this reality, BMI does its best to educate the music users on their need to comply with the obligations set forth in the copyright law.

In an effort to reduce the cost of licensing, and thereby reduce the amount of fees that users will be responsible for, BMI will negotiate master license agreements with associations of small businesses which use music. Such an agreement is administered by the association for the benefit of its members, and will usually provide for a reduced rate.

BMI has had discussions with various State restaurant associations about the possibility of licensing under such a structure. In fact, BMI has had a series of discussions with the New Jersey Restaurant Association. While BMI and the association has not yet reached an agreement, we believe the negotiations demonstrated that both parties recognize the value of music, and the benefits a master license can offer.

It should be noted that the majority of BMI's revenues are not derived from licenses structured and arrived at unilaterally, but are the result of extensive negotiations, with industry groups and associations. These include negotiations with industry groups and associations, local television, radio, hotels, jukeboxes, background music service, amusement parks, symphony orchestras, colleges and universities, and trade shows and conventions.

Of course, members of these industries are not bound by these negotiations, but the negotiation process does carry great weight because BMI is required by its consent decree to treat all similarly situated licensees in a nondiscriminatory manner.

Perhaps it would be best to look at what the license fees that BMI charges are for restaurants and retail stores using radio. The magnitude license fees for those licensees who utilize music by means of radio start at $105 per year for restaurants, nightclubs and the like. For retail establishments, the annual license fees range from $60 per year to $480 per year. Fees for television and audiovisual uses are somewhat higher.

A blanket license for such uses which offers access to over 2,500,000 songs created by BMI songwriters and composers comes to approximately 30 cents a day for a restaurant and 15 cents per day for retail business. This is truly a modest sum for music which enhances ones business.

The public tends to think of songwriters in terms of those who both write and perform. Successful writer artists such as Michael Bolton and Paul Simon are viewed as wealthy people who do not need the few dollars paid by restaurants and similar establishments. This is truly a distorted picture of the situation.

Most songwriters are not performers, and they rely upon the proceeds of their writings for their food and rent money. This is a vital part of their livelihood we are talking about.

I hope that these remarks have helped to give some insight into the types of licenses and BMI's method of licensing music. I welcome any questions you have, and thank you for the opportunity to be heard.

Mr. HUGHES. Thank you, Mr. Berenson.

[The prepared statement of Mr. Berenson follows:]

Prepared Statement of Marvin L. Berenson, Senior Vice President and General Counsel, Broadcast Music, Inc. (BMI)

Mr. Chairman, Members of the Subcommittee, my name is Marvin Berenson and I am General Counsel for BMI, a United States performing rights organization that represents approximately 100,000 U.S. songwriters and composers and approximately 50,000 U.S. publishers. BMI collects license fees on behalf of those American creators it represents, as well as for the thousands of creators from around the world who have chosen BMI for U.S. representation. The license fees collected by BMI for the "public performances" of BMI's repertoire of approximately 2,500,000 compositions are then distributed as royalties to the writers and copyright holders BMI represents and include radio airplay, broadcast and cable television carriage, and live and recorded performances by all other users of music. Additionally, BMI represents its songwriters, composers and publishers in the collection of royalties under the Audio Home Recording Act of 1992.

BMI is headquartered in New York, with offices in Nashville, Los Angeles, London, Phoenix, San Juan, Middleboro (MA), and Red Bank (NJ). It was created in 1939 to provide a competitive source of music licensing in the United States. A not-for-profit-making corporation, BMI opened the door to performing rights representation for songwriters and composers of all types of music, many of whom were not eligible under the membership guidelines of the older American performing rights organizations.

From the outset, BMI adopted a dramatic series of innovations that set it apart from its competitors. First and foremost was BMI's "open door" policy.

When BMI came into existence, ASCAP represented the musical works of less than 150 publishers and slightly more than 1,000 writers which were the only U.S. works available through ASCAP. Additionally, SESAC, then a small, highly specialized organization, represented a very limited repertoire. The repertoire at that time almost entirely excluded forms of American music that were beginning to grow in popularity, such as rhythm and blues, gospel, country, and jazz.

BMI opened its doors to all writers and publishers, including many who in the past had not received royalties for the performance of their works. This "open door" policy made it possible for the users of music to have a greater number and variety of works to perform. BMI adopted a plan under which writers and publishers would receive royalties for performances of their works, be they live or recorded, or presented on a national, regional or local basis.

Due in a large part to this "open door" policy, BMI has been a major force in the growth of American music over 54 years. Our writers and publishers have made extraordinary musical and cultural contributions, bringing country, rhythm and blues, rock & roll, Black, Latin, jazz gospel, film, pop, classical theatre and numerous other musical genres into the mainstream of public awareness.

Today, BMI represents approximately 150,000 copyright owners in all genres of music and on their behalf grants legal access to its repertoire of over 2,500,000 musical works through blanket license agreements. A blanket license agreement allows music users to make unlimited use of the works in BMI's repertoire for the year, for one annual fee. BMI's blanket licenses cover all classes and categories of music users, including major television networks using millions of copyrighted musical performances per year, radio and television broadcast stations, cable networks, as well as hotels, restaurants, universities, and many other venues. BMI logs airplay performances on radio and television through the most comprehensive and advanced survey and census techniques. Our most performed work, "Yesterday" by Paul McCartney and John Lennon, just surpassed the 6 million performance mark.

BMI writers have won numerous Grammys, American Music Awards, Oscars, Emmys, Tonys, Pulitzer Prizes, MTV and CMA Awards. BMI's roster includes such notable songwriters and composers as Alan Menken, John Williams, Lionel Hampton, Buddy Holly, Sandy Patti, John Lennon, Ray Charles, Eric Clapton, Paul Simon, Elvis Presley, Miles Davis, David Foster, Carole Bayer Sager, Bee Gees, Beach Boys, Willie Nelson, Thelonious Monk, Dolly Parton, Gloria Estefan, Nirvana, R.E.M., Michael

Bolton, Mariah Carey, Lou Reed, Vince Gill, Carole King, Aretha Franklin and Chet Atkins.

Public Performances under the Copyright Law

Pursuant to the U.S. Copyright Law, if a person desires to publicly perform a copyrighted musical composition, the person must obtain permission from the creator of the musical composition. BMI enters into affiliation agreements with the writers, composers and publishers of musical compositions. These agreements grant to BMI a non-exclusive right of public performance. BMI, in turn, licenses to users of music the right of public performance to the musical compositions contained in its repertoire. As stated above, BMI is operated on a not for profit basis, and all fees received, less administrative expenses and certain reserves, are distributed to its songwriters, composers and publishers.

BMI opposes H.R 3288 as an amendment to the Copyright Act because it would deprive copyright owners of that which Congress long ago determined it was their right to receive. By greatly expanding the situations under which music can be used without compensation to its owners, this bill would make music a commodity that its creators would be compelled by law to donate free of charge to owners of restaurants and like establishments to use for their benefit. To say that such music is "incidental" to the establishment's main purpose is to fail to recognize what Supreme Court Justice Oliver Wendell Holmes stated over 75 years ago: "If music did not pay, it would be given up." Herbert v. The Shanley Company, 242 U.S. 591, 595 (1917).

When a business offers something to its patrons, it is obviously thought to be "good for business". When a radio or television is turned on in a restaurant, it has economic value to the proprietor. The people who own the music emanating from those devices, having created part of that value, should not be forced by statute to contribute their property (musical compositions) when no one else providing value to the business is asked to do the same.

Music is pervasive in the American lifestyle. People use it in a million ways -- in the home, business, restaurant, TV, Cable television and movies. It is so readily available that people tend to think it's

free, and they believe they have the right to use music as they please. It's not scrambled like Cable TV network signals (like HBO or MTV). It isn't something like Coca-Cola where the formula is secret. You can buy music in one form and then use it for other purposes. For example, you can buy tapes for use in your home and then play them over and over again in your restaurant so your customers can better enjoy the restaurant's ambience and thus enjoy their dinner. Buying that record or tape meant that you paid for the right to listen to the musical works in your home, but not the right to perform them in public for your commercial benefit or advantage. That's protected by another right, and it's what we're here to discuss today.

Property rights in an intangible such as music are often difficult to comprehend. Many listeners assume that, because music comes from a radio or television or a record or tape they have purchased, it is theirs to do with as they wish. Although the Copyright Act's grant of exclusive rights dates back decades, BMI and similar organizations spend countless hours educating music users both as to this concept and the statute that affirms it. Even then, unfortunately, too many people do not believe that they must pay for publicly using music, even though they may begrudgingly admit that it probably is someone else's property.

Congress long ago recognized that performing rights to musical compositions were the property of their creators, and it left the enforcement of those rights up to the creators themselves. But unlike an author who may write one book a year, or a playwright who may create two or three plays annually, a prolific composer or songwriter could conceivably create dozens of works that may have numerous performances at any given time.

When a single music creator's output is viewed in relation to the ease of nationwide public access to those works -- by simply turning on a radio, buying a record or playing an instrument -- it is evident why a collective organization such as BMI is necessary to assure that the rights Congress conferred upon the creator are protected to the fullest extent possible. Without an organization such as BMI, a music user would be compelled to seek out every copyright owner whose music the

user is publicly performing to obtain permission for such performances. The availability of a BMI blanket license saves the user time and money in obtaining the necessary rights. Without BMI's efforts, the creations that we can hear with the push of a button would otherwise go uncompensated. If that were to happen, the incentive for a composer to continue at his or her livelihood would disappear, leaving society all the poorer.

Since its inception more than 50 years ago, BMI and its business of music licensing has been periodically examined in various contexts by both Congress and the courts, with a result that has been reaffirmed time and time again, namely, that a performing rights organization is the most effective and practical means to protect the rights to copyrighted music.

The Use of Broadcast Transmissions

Congress examined the entire matter of broadcast transmissions used in public places in its writing of the 1976 Copyright Act. In fact, the Supreme Court had decided a case in 1975 on the subject, and Congress took the opportunity to address the issue specifically in light of the Supreme Court's ruling that, under the 1909 Copyright Act, when the owner of a restaurant played music from a radio it did not constitute a public performance. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975).

The restaurant was a small fast-service chicken restaurant known as "George Aiken's Chicken," located in downtown Pittsburgh, Pennsylvania. The restaurant consisted of 1,055 square feet of total leased space, with 620 square feet open to the public. The Supreme Court described George Aiken's use of music as follows: "Aiken usually turns on the radio each morning at the start of business. Music, news, entertainment, and commercial advertising broadcast by radio stations are thus heard by Aiken, his employees, and his customers during the hours that the establishment is open for business." Id. at 152.

When Congress enacted the 1976 Copyright Act, it specifically rejected the holding of Aiken that playing music from a radio was not a public performance. The Section 101 definition of "public performance" makes it clear that the playing of music in an

establishment which is open to the general public constitutes a public performance, regardless of the source of that music. The House Report accompanying the Act states that the Aiken case "is completely overturned by the present bill and its broad definition of 'perform' in Section 101." H.R. Rep. No. 1476, 94th Cong., 2d Sess., pg. 87, reprinted in 1976 U.S. Code Cong. & Admin. News 5659.

Congress did, however, provide in Section 110(5) an Aiken-style exemption for small businesses, which exempted them from the obligation to pay licensing fees for the use of music derived from a single inexpensive home-style receiving apparatus. According the Report of the Senate/House Conference Committee, Congress intended the Aiken "fact situation to represent the outer limit of the exemption ... the line should be drawn at that point." Id. Thus, it was clear that the exemption was intended to be an extremely limited one.

The Congressional intent to limit the exemption to small businesses, such as the one run by George Aiken, is clear. The conference Report states that: "It is the intent of the conferees that a small establishment" be exempt from the obligation to pay royalties, and specifically notes that a business which is of "sufficient size to justify, as a practical matter, a subscription to a commercial background music service" would not be exempt. The House Report refers to "a small commercial establishment" and states that the exemption "would exempt small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customers' enjoyment...." Id.

For over 15 years, numerous courts interpreting Section 110(5) relied upon either the House/Senate Conference Report or the House Report, or both, to fashion a body of case law that clearly informed public users of music from radios or televisions of the instances when they were responsible for obtaining permission, and allowed copyright owners to receive compensation in all but the most limited circumstances, namely when a "mom and pop" business turned on a small radio or television set. Taking their cues from Congress, the courts resisted any attempt to expand this limited exception to the copyright

owner's exclusive rights, since these property rights were not to be donated to others unless Congress clearly intended they be.

Specifically, both the Second Circuit in Sailor Music v. The Gap Stores, Inc., 516 F. Supp. 923 (S.D.N.Y.), aff'd, 668 F.2d 84 (2d Cir., 1981) cert. denied, 456 U.S. 945 (1982), and the Ninth Circuit in Broadcast Music, Inc. v. United States Shoe Corporation, 678 F.2d 816 (9th Cir. 1982), refused to expand the exemption to large chain operations which could clearly afford music license fees. Lower courts addressing the issue followed these decisions and made it clear that a business which is financially able to pay copyright licensing fees should not be exempt from the obligation to pay those fees.

For example, the District Court for the Western District of Texas has held that "it is clearly 'practical' for a chain of restaurants...grossing well over $500,000 annually to subscribe to a commercial background music service," and that "[d]efendants' prior subscription to a commercial background music service further establishes the inapplicability of the exemption of defendants' performances of copyrighted musical compositions." Merrill v. Bill Miller's Bar-B-Q Enterprises, Inc., 688 F. Supp. 1172, 1176 (W.D. Tex. 1988). The District Court for New Hampshire has held that the Section 110(5) exemption was not applicable because "defendants' $2.5 million in annual retail sales justifies subscription to a commercial background music system." Merrill v. Country Stores, Inc., 669 F. Supp. 1164, 1170 (D.N.H. 1987).

The District Court for the Middle District of North Carolina has held that any establishment large enough to be a potential customer of a background music service is not covered by the Section 110(5) small business exemption. Springsteen v. Plaza Roller Dome, Inc., 602 F. Supp. 1113, 1119 (M.D.N.C. 1985).

The District Court for the Northern District of California denied an attempt to invoke the Section 110(5) exemption because the defendant's stores were "of sufficient size to warrant use of a commercial background music system -- a fact confirmed by defendant's testimony that they employ such a service at two of the [stores]." Lamminations Music v. P&X Markets, Inc., 1985 Copyright L. Dec. (CCH)

¶25,790, at 19,556 (N.D. Ca. 1985).

It wasn't until 1991 when, in a case involving a national chain store operation, the Seventh Circuit upheld a decision that the chain store was entitled to the Section 110(5) exemption notwithstanding the legislative history relied upon by courts in previous cases. The Court specifically found that the revenues of the chain store and the fact that it was a chain of nearly 700 stores were not relevant to the analysis. Broadcast Music, Inc. v. Claire's Boutiques, Inc., 949 F. 2d 1482 (7th Cir. 1991).

The Eighth Circuit followed suit in Edison Brothers Stores, Inc. v. Broadcast Music, Inc., 954 F.2d 1419 (8th Cir. 1992). Thus, only within the last two years did any court refuse to assess Congress' intentions in dealing with the use of broadcast transmissions of music in public places.

BMI's Licensing Practices

In 1990, BMI developed new methods of communications to businesses using music in order to increase public awareness of the need to obtain permission to publicly perform copyrighted music. Such efforts have been in the form of direct mail and telemarketing in addition to telephone and in-person contacts made by our Licensing Executives. BMI also utilizes advertising in an effort to build awareness and establish credibility about BMI and music licensing and to convey a positive, warm and friendly image. The objective is also to promote the use of music and its benefits to current and potential music users. In support of direct mail, BMI has created a number of brochures targeted to the various markets which we license. In addition, to reach this audience, BMI has published special issues of the BMI quarterly magazine "BMI MusicWorld" focusing on licensing.

BMI makes every effort to build relationships and understanding of its function and purpose by means of presentations to and seminars with centers of influence such as national trade associations and the Council of Better Business Bureaus. We have made direct presentations to and participated in seminars with the meeting planners industry, racquet sports association, Shopping Center Mall managers, and the Annual Assembly of Better Business Bureaus. The National Council of

Better Business Bureaus has published a new Business Advisory series entitled "Music in the Marketplace - Who Pays the Piper".

BMI has introduced a Licensee Service Area which specializes in responding to licensee's general inquiries concerning rates, license requirements and the like, by phone and letter. The department has its own 800 number for free direct access.

BMI has also produced many videos explaining its functions to specific industries such as the trade shows and meeting planners industry, as well as a general all encompassing video covering the multitude of industries that use music.

BMI's communication efforts focus on providing education and information to both potential music users and known music users. Following Standard Industrial Classification (SIC) economic activity groupings, BMI uses published lists of businesses to identify potential licensees.

Educational literature is developed for all possible music using industries which explains songwriters' rights and the responsibilities of businesses if music is used. BMI's direct mail campaign process involves a series of communications providing complete explanation of who BMI is, what BMI's role is in the music licensing process, and who BMI represents.

BMI's literature speaks of the particular industry's possible use of music and how this applies to the licensing process. A response device is included in the text, whether it be our 800 number and/or a survey questionnaire which assists a potential licensee in communicating to BMI the business' use or non-use of music. Letters mention the value of music and its role in many business operations.

The series starts with an introductory letter giving background on BMI, the possible types of music uses by the industry BMI is communicating with, and a brief explanation of the Copyright Law requirement when music is performed publicly. The series of mailings may encompass as many as six or more letters to a potential licensee, all giving explanation about the purpose of the follow-up telephone calls and/or personal visits and the importance of meeting their obligations if music is used.

A percentage of an industry group is contacted by telephone to research which businesses use music. Questions are posed concerning the extent of music use. If no music is used, BMI thanks the person for his or her time and this fact is noted in our database. BMI makes no further contact.

If music is used and there is sufficient information on the extent of licensable music (such as live bands and the use of recorded music on CD's records, or tapes), further information is given by BMI representatives concerning the responsibility of the business to obtain the necessary permission from those who own the music. Explanation is given on BMI's role, and further dialogue continues by answering questions on such matters as the factors involved in determining a fee. Each telemarketing representative additionally has to service the potential licensee by completing the information on the agreement and sending it to them for their signature.

All BMI contacts are based on professionalism and cordiality. Training is conducted on a weekly basis to address new issues that arise with a knowledgeable BMI representative who is trained to be both courteous and professional at all times. BMI constantly supervises the activities of the telemarketers, and monitors their calls with our service monitoring equipment. They are also trained to respond cordially even if situations arise where they may be provoked by the person being called.

As mentioned earlier, in addition to direct mail and telemarketing, BMI has a staff of approximately forty Licensing Executives in the field who call upon various locations. Visits are made only after BMI has made every reasonable effort to verify whether a location is using music and to make an appointment. In almost all cases, a series of letters has been sent to the establishment. The letters are intended to explain the value of music to the establishment, to inform the establishment as to the benefits of a BMI license and to explain to the establishment its obligation under the requirements of the Copyright Law.

BMI's Licensing Executives' contacts and presentations must follow the same philosophy as is apparent from our printed materials -- we

educate and inform. We do not intimidate, harass or abuse. If we are informed of any such conduct by a representative, BMI immediately and thoroughly investigates the claim, and appropriate action is taken, if necessary. Happily, instances of such claims have been few and far between and, to the best of our knowledge, have always been satisfactorily resolved. If the Committee has any specific information with regard to unacceptable conduct by BMI representatives, BMI would appreciate receiving the specifics so we can look into such claims.

The heart of the matter is that performing rights organizations are enforcing the law, and it is difficult to explain our function without referring to the Copyright Law. The fact is that no "fence" can be put around the public performance of our music. Given this reality, BMI does its best to explain the music user's need to comply with the obligations of the Copyright Law. At some point we may have to advise the user that the possibility of litigation is in fact the only recourse we have to prevent our product from being illegally taken from us. It seems to us inevitable that some music users will interpret these explanations as threats or intimidation. They are not so intended, and BMI constantly reviews its materials and presentations to find the best ways of conveying the information.

BMI uses every tool of communication that it can to support the Licensing Executive and prepare an establishment for a visit from the Licensing Executive. It would, we suppose, be our fondest dream that visits were not needed, that our direct mail and telemarketing were totally successful in explaining the need for permission to publicly perform music, and we received all licenses through the mail. Such is not the case, and visits are sometimes necessary. When they are made, we have made every reasonable effort possible to notify the establishment, and we do not appear out of nowhere and demand a license and a fee. Most pieces of our literature suggest to users that they consult an attorney if they have any questions, and our Licensing Executives do the same.

When our exhaustive efforts to license music using establishments do not succeed, BMI brings copyright infringement actions. Approximately 300-400 such actions are brought each year. This

represents, however, only a small fraction of the 15,000 licenses we receive each year, and an even smaller fraction of the number of establishments we are contacting during a year for license agreements.

In an effort to reduce the cost of licensing, and thereby to reduce the amount of fees which users would be responsible for, BMI will negotiate master license agreements with an association of small businesses which use music. Such an agreement is administered by the association for the benefit of its members and will usually provide for a reduced rate. BMI has had discussions with various state restaurant associations about the possibility of licensing under such a structure, and has entered into master license agreements with such industries as dance and fitness. Recently, BMI had a series of discussions with the New Jersey Restaurant Association. While BMI and the Association have not yet reached an agreement, BMI believes the negotiations showed that both parties recognized the value of music and the benefits a master license agreement can offer.

The majority of BMI's revenues are not derived from license structures arrived at unilaterally, but are a result of extensive discussion and negotiation with industry groups and associations, represented by counsel. Among the license types which resulted from this process are: Local Television; Radio; Public Broadcasting; Hotel/Motel; Background Music Service; Jukebox; Amusement Parks; Symphony Orchestras; Colleges and Universities; and Trade Shows / Conventions. These arm's length negotiations result in fees, terms and conditions which are satisfactory to both sides. Of course, members of the industries are not bound by the negotiations, but the negotiation process does carry great weight because BMI is required by its consent decree with the U.S. Department of Justice to treat all similarly situated licensees in a non-discriminatory manner.

With direct reference to the effects which the Public Accommodations Exception Act might have upon BMI, we would advise you that, as a result of the Claire's and Edison Brothers decisions, which we mentioned earlier, many licenses were canceled and BMI lost in excess of a half million dollars in revenue. In addition, we estimate that if all performances of radio and television did not require

permission, it would potentially affect a vast number of locations which we are licensing or attempting to license. This revenue is distributed to our songwriters and music publishers, whose livelihood in large part depends upon public performance royalty distributions.

One must look at the magnitude of the BMI license fees for those licensees who utilize music by means of radio. Our fee in a restaurant, nightclub or similar establishment with occupancy of up to 75 is $105 a year. If the establishment has between 226 and 300 occupancy, the fee is $280 a year. If however, multiple television sets are used, their fee is 35% higher. Our fee in a retail store or other commercial establishment is based upon square footage: $60 a year for up to 1,500 square fee, with a graduated fee of up to $480 a year for over 5,000 square feet. Fees for audiovisual uses are somewhat higher. Thus, a user has access to all of the over 2,500,000 songs created by BMI's affiliates, and can use this music to enhance and make more profitable his or her business, for about 30¢ a day in a restaurant and 15¢ a day in a store. This is truly a modest sum for music which enhances one's business

I hope that these remarks have help to give some insight into the types of licenses and BMI's methods of licensing music for public performance. I welcome any questions you may have.

Mr. HUGHES. Mr. Candilora, welcome.

STATEMENT OF VINCENT CANDILORA, PRESIDENT AND CHIEF OPERATING OFFICER, SOCIETY OF EUROPEAN STAGE AUTHORS AND COMPOSERS (SESAC)

Mr. CANDILORA. Thank you. On behalf of SESAC, I would like to express our appreciation to Chairman Hughes and to all the members on the subcommittee for the opportunity to submit this statement.

SESAC was founded in 1930 by Paul Heinecke, and is one of the few privately owned performing rights organizations in the world. A little over a year ago, SESAC was acquired by Stephen Swid, Freddie Gershon, Ira Smith, and the investment banking firm of Allen & Co.

Under the direction of Messrs. Swid, Gershon, and Smith, SESAC continues to fulfill Mr. Heinecke's mission more than a half century later by finding, developing and protecting the rights of creative talent out of the mainstream of contemporary music capitals.

Today, SESAC represents some 2,500 writers and publishers and 160,000 musical compositions of all types. SESAC licensing practice and its plans for future licensing, I would like to touch on.

SESAC licensing is separated, as you've heard both ASCAP and BMI stated, into two areas, into the general area and the broadcast area, and we have also included a telecommunications areas. Broadcast licensees include commercial, public and noncommercial radio and television stations. Telecommunication licensees include basic and pay cable programming services, digital cable radio services, and satellite delivered services. Performances and other media fall under the general licensing department.

Although it is a music users responsibility under the law to obtain advance authorization for public performances of music, in almost all cases the initial contact is made by SESAC.

Currently, SESAC broadcast and general licensing efforts are conducted from its headquarters in Nashville, TN. SESAC's licensing representatives are each responsible for researching and licensing facilities in a given territory. An introductory mailing includes a license, a brochure or flyer describing SESAC, and a cover letter generally outlining the establishment's obligation under the copyright law. Followup phone calls are made and additional letters are sent if necessary. The subsequent contacts are usually educational in nature and may include copies of the Copyright Act and citations to case law.

SESAC employees are frequently reminded that SESAC enters into long-term relationships with prospective licensees. It is therefore extremely important that the representative conduct himself or herself in a professional, courteous and cooperative manner at all times.

Most business owners want to do the right thing under the law, and after receiving information on the copyright law willingly enter a license. Unfortunately, owners and operators of some businesses remain adamantly opposed to music licensing. If the numerous

phone calls and letter prove unsuccessful, the facility is sent a certified letter warning that performance of SESAC music will constitute copyright infringement, and setting forth the remedies that may be ordered.

Monitoring to detect unauthorized performances follow, and additional attempts are made to license the facility. SESAC uses copyright infringement litigation only as a last resort to protect the rights of its writers and publishers. As a general rule, SESAC representatives negotiate with operators of individual facilities. However, its rate schedules and terms are consistent for license types. For example, all theaters with the same number of seats pay the same license fee.

SESAC rates are based upon market factors directly related to the industry and are reviewed on an annual basis, and adjusted if changes in the license fee factors have occurred.

SESAC and its employees are active members in many trade organizations and associations including the National Association of Broadcasters, National Religious Broadcasters Association, State broadcast associations, the American Hotel and Motel Association, the International Association of Auditorium Managers, et cetera.

For several decades, SESAC has licensed well over 90 percent of the broadcast industry, both radio and television. Like performing rights organizations all over the world, SESAC primarily uses blanket licenses. The flexibility, comprehensive coverage, and ease of administration of this type of license remain the key reasons for its popularity and widespread use.

SESAC's broadcasting license fees are not tied directly to a station's revenue, but are based upon the size of a station's market, the potential audience, and the spot advertising rates charged by the station. This assures that large and small market stations, and high-rated and low-rated stations are treated fairly vis-a-vis one another. Through the years SESAC has tried to work smoothly with broadcasters, and to listen and respond to their licensing concerns.

In response to often-heard comments from broadcasters in mid-1993, SESAC announced a new licensing model. In early 1993, entered into an exclusive agreement with Broadcast Data System or BDS. BDS owns the technology used by Billboard Magazine that tracks the airplay of records and songs to determine their position on the popularity charts.

Songs released on compact disk are loaded electronically into the BDS system, and a digital footprint or thumbprint if you like of each song is created. The loading of the record into the system and the creation of the thumbprint do not alter the actual recording so that there is no effect on the recording, there is no effect to the quality of the recording or interference with the product in any way.

BDS places monitoring devices in radio markets that are capable of listening to several radio stations at one time. The digital thumbprint in the BDS system is matched against the on-air broadcast, and then that is tracked to the actual performance of the song.

BDS then reports that information to SESAC. BDS and SESAC have been testing this technology on Spanish-language format stations for several months. SESAC plans to go live with the system very soon. For the first time payment for music licensing will be based upon actual performances, so that a station's monthly license fee will vary according to the amount of SESAC music performed.

SESAC general licensing department is responsible for licensing performances of music in areas other than radio and television. Currently, license types includes hotels, restaurants, nightclubs and taverns, colleges and universities, background music services, airlines, theme parks, sports teams, stadia, theaters, auditoriums and concert hall, and funeral homes.

As with broadcast licensees, license fees for general licenses are based upon factors relevant to their business. For hotels, the fee is based upon live or mechanical music use, the number of rooms and the room rates. College fees are based on enrollment; theater fees are based on seats; theme parks are based on paid attendance.

In recent years, SESAC has had productive discussions with trade associations and groups. Those discussions have been informative and beneficial, and SESAC is always willing to discuss an industry's concern with industry leaders. SESAC is currently working with a group of convention and meeting planners with the goal of making music licensing for such events easier.

Finally, I would like to make a comment on H.R. 2388. I have in my statement, referring to *Herbert* v. *Shanley* as Marvin had mentioned Justice Holmes said that if music did not pay, it would be given up; if it pays, it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough.

Morton mentioned an analogy about bread, and how you certainly wouldn't ask the bakers to provide free bread to all of the establishments. I thought about that, and thought perhaps a better analogy would be parsley. We see it most of the time when we sit in a restaurant. It is part of the presentation of food, and yet no one really engages in eating it, and yet someone grows it, someone sells it, and it is used to add to the ambiance of the restaurant and the food.

SESAC submits that the principle set forth in Justice Holmes' opinion applies today. Establishments may and do benefit from performances of copyrighted works on premises as the establishment receives a benefits from using copyrighted works. It is only fair that the creators and owners of the copyrighted works receive compensation.

The current copyright law is carefully thought out and crafted, balancing the interests between both the users and the owners of copyrighted works. I am grateful to the committee for this opportunity to summarize SESAC's licensing activities, and to express its comments.

Mr. HUGHES. Thank you, Mr. Candilora.

[The prepared statement of Mr. Candilora follows:]

Prepared Statement of Vincent Candilora, President and Chief Operating Officer, Society of European Stage Authors and Composers (SESA)

SESAC, Inc. hereby expresses its appreciation to Representative William J. Hughes, Chairman, and to all the members of the Subcommittee on Intellectual Property and Judicial Administration of the Committee on The Judiciary of the United States House of Representatives for the opportunity to submit this statement.

I. SESAC BACKGROUND

SESAC was founded in 1930 by Paul Heinecke, a German immigrant and American citizen. In his twenties, Mr. Heinecke had been the American Manager of Breitkopf and Hartel, the largest European publisher of music in the world. He paved the way for American performances of "Sibelius' Finlandia" and "Valse Triste," "Ponce's Estrellita" and "Provost's Intermezzo" as well as the music of modern composers such as Arnold Schoenberg and Frederick Delius. He formed SESAC to represent the unrepresented composer and author. In its early years, SESAC was known as the Society of European Stage Authors and Composers - that connotation was discontinued nearly 60 years ago as the SESAC repertory became overwhelmingly Americanized. SESAC became and is a well known trade name in the music industry.

SESAC, the only privately-owned performing rights organization in the world was acquired by Stephen Swid,

Freddie Gershon, Ira Smith and the investment banking firm of Allen & Co. in 1992. Mr. Swid is Chairman and CEO of SCS Communications which owns and operates diverse media properties including a scholarly book publisher and SPIN, a music and youth culture magazine. He is also an independent film producer. Mr. Swid was formerly Chairman and CEO of SBK Entertainment World, a worldwide entertainment services company and the largest privately owned music publisher in the world. Until July 1986, he was founder, co-chairman and co-chief executive officer of Knoll International Holdings Inc., one of the nation's largest privately held manufacturing companies. Mr. Swid is a member of the Council on Foreign Relations, a Director of the Institute for East West Studies and a Trustee of the Solomon R. Guggenheim Museum. Mr. Gershon, an entertainment attorney, has represented many of the most prominent stars in the music industry. He also served as counsel to the Stigwood Group ("Jesus Christ Superstar"), was intimately involved in the production and financing of a number of successful motion pictures, plays and soundtrack albums and is the author of a best-selling novel. Mr. Gershon currently serves as Principal, Chairman and CEO of Music Theatre International, one of the largest and oldest grand rights licensing organizations for musicals. An attorney formerly in private practice, Mr. Smith is Vice Chairman and CEO of the Alexander Doll Company which he and a partner acquired

from the founder, Madame Alexander. He has served as CEO of Music Theatre International and is now responsible for its worldwide financial operations. Mr. Smith was engaged in the financing and production of motion pictures including "Amityville II: The Possession", "Conan, the Barbarian", "King of Comedy" and many others. He began his career as a trial attorney at the Securities and Exchange Commission.

The trio has brought a new entrepreneurial spirit to SESAC as well as a desire to seek out and enter creative and alternative licensing schemes. Under the direction of Messrs. Swid, Gershon and Smith, SESAC continues to fulfill Mr. Heinecke's mission more than a half-century later by finding, developing and protecting the rights of creative talent out of the mainstream of contemporary music capitals. Today SESAC represents some 2,500 writers and publishers and 160,000 musical compositions of all types.

II. SESAC LICENSING PRACTICES

The following is a brief outline of SESAC's licensing practices and its plans for future licensing. SESAC's licensing is separated into general, broadcast and telecommunications areas. Broadcast licensees include commercial, public and noncommercial radio and television stations. Telecommunications licensees include basic and pay cable programming services, digital cable radio services and satellite delivered services. Performances in other media fall under the general licensing department.

Although it is a music user's responsibility under the law to obtain advance authorization for public performances of music, in almost all cases, the initial contact is made by SESAC. Currently, SESAC's broadcast and general licensing efforts are conducted from its headquarters in Nashville, Tennessee. SESAC's licensing representatives are each responsible for researching and licensing facilities in a given territory. An introductory mailing includes a license, a brochure or flyer describing SESAC and a cover

letter generally outlining an establishment's obligations under the copyright law. Follow-up phone calls are made and additional letters are sent if necessary. These subsequent contacts are usually educational in nature and may include copies of the Copyright Act and citations to case law.

SESAC's employees are frequently reminded that SESAC enters into long term relationships with prospective licensees. It is therefore extremely important that the representative conduct himself or herself in a professional, courteous and cooperative manner at all times. Most business owners want to do the right thing under the law and after receiving information on the copyright law, willingly enter a license. Unfortunately, owners and operators of some businesses remain adamantly opposed to music licensing. After numerous phone calls and letters prove unsuccessful, the facility is sent a certified letter warning that performance of SESAC music will constitute copyright infringement and setting forth the remedies that may be ordered. Monitoring to detect unauthorized performances follows and additional attempts are made to license the facility. SESAC uses copyright infringement litigation only as a last resort to protect the rights of its writers and publishers.

As a general rule, SESAC representatives negotiate with operators of individual facilities. However, its rate schedules and terms are consistent for license types. For example, all theatres with the same number of seats pay the same license fee. SESAC's rates are based upon market factors directly related to the industry and are reviewed on an annual basis and adjusted if changes in the license fee factors have occurred.

SESAC and its employees are active members in many trade organizations and associations, including the National Association of Broadcasters, the National Religious Broadcasters association, state broadcaster associations, the American Hotel and Motel Association, International

Association of Auditorium Managers, International Association of Exposition Management, American Society of Association Executives, International Association of Conference Centers, International Association of Music Parks and Attractions, National Restaurant Association, Country Music Association, National Academy of Recording Arts and Sciences and many others.

III. SESAC RADIO AND TELEVISION LICENSING

For several decades, SESAC has licensed well over ninety percent of the broadcasting industry, both radio and television. Like performing rights organizations all over the world, SESAC primarily uses blanket licenses. The flexibility, comprehensive coverage and ease of administration of this type of license remain the key reasons for its popularity and widespread use. SESAC's broadcasting license fees are not tied directly to a station's revenues, but are based upon the size of the station's market (potential audience) and the spot advertising rates charged by the station. This assures that large and small market stations and high rated and low rated stations are treated fairly vis-a-vis one another. Through the years, SESAC has tried to work smoothly with broadcasters and to listen and respond to their licensing concerns.

In response to often heard comments from broadcasters, in mid-1993, SESAC announced a new licensing model. In early 1993, SESAC entered into an exclusive agreement with Broadcast Data Systems or BDS. BDS owns the technology used by Billboard Magazine that tracks the airplay of records and songs to determine their position on popularity charts. Songs released on compact disc are loaded electronically into the BDS system and a digital footprint of each song is created. The loading of the record into the system and the creation of the footprint do not alter the actual recording so that there is no diminution of or interference with the quality of the recorded product. BDS places monitoring devices in radio markets that are capable of "listening" to several radio stations at one time. The digital footprint in the BDS system is matched against the on-air broadcast that have been monitored to track actual performances of songs. BDS then reports that information to SESAC.

SESAC and BDS have been testing the BDS technology on Spanish language format stations for several months. SESAC plans to go live with the system soon. For the first time, payment for music licensing will be based upon actual performances so that a station's monthly license fee will vary according to the amount of SESAC music performed. SESAC believes that this technology will prove to be a viable alternative to present licensing practices. SESAC

has chosen the Latin format stations because of the controlled number of stations and their market locations. While the technology is still experimental, SESAC hopes that as costs decline, the system can be made available to stations in other formats.

Finally, SESAC has entered blanket licensing agreements with numerous basic and pay cable services as that method of delivery has grown in size and popularity. SESAC is currently discussing alternative licensing schemes with several organizations, however, our discussions remain in early stages. SESAC has tried to understand the business and financial concerns of start-up organizations and to be flexible in licensing arrangements with these services.

IV. SESAC GENERAL LICENSING

SESAC's general licensing department is responsible for licensing performances of music in areas other than radio and television. Current license types include hotels, restaurants, nightclubs and taverns, colleges and universities, background music services, airlines, theme parks, sports teams and leagues, stadiums, theatres, auditoriums and concert halls and funeral homes. As with broadcast licensees, license fees for general licensees are based upon factors relevant to their businesses. For hotels

the fee is based upon live or mechanical music use, the number of rooms and room rates. College fees are based on enrollment; theatre fees are based on seats; theme parks are based on paid attendance, etc.

As set forth in Section II. above, contact is normally made with individual establishments. In recent years SESAC has had productive discussions with trade associations and groups. Those discussions have been informative and beneficial and SESAC is always willing to discuss an industry's concerns with industry leaders. SESAC is currently working with a group of convention and meeting planners with a goal of making music licensing for such events easier.

V. OPPOSITION TO H.R. 3288

SESAC opposes the adoption of H.R. 3288 which would exempt from infringement the communication of a transmission by the public reception of the transmission in commercial establishments serving food and drink.

In 1917 Justice Holmes in Herbert v. Shanley 242 U.S. 591 (1917) was right when he said:

> They [the defendants' performances] are part of a total for which the public pays, and the fact that the price of the whole is attributed to particular items which those present are expected to order is not important. It is true that the music is not the sole object, but neither is the food, which probably could be gotten cheaper elsewhere. The object is repast in surroundings that to people having limited powers of conversation or disliking the rival noise give a luxurious pleasure not to be had from eating a silent meal. If music did not pay, it would be given up. If it pays, it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough. (Emphasis added).

In a recent issue of Hospitality Management the Contract Design columnist recognized that the value of music to a commercial facility has not changed. Bill Lepley, owner of Minneapolis' South West Sound noted

> "I've seen restaurants lose business not because their music was aesthetically a poor choice, but because some how it was irritating...I was in a restaurant once where they were playing foreground music a bit too loud. (Foreground music has voices in it; background music is solely instrumental.) Customers were subconsciously coping with the voices in the music and speaking louder than was necessary"... He suggested that the owner switch over to light jazz background music and almost immediately the noise level in the room dropped. "Sound systems aren't just sound. They combine music and the mind. If the music is bad, a patron will react almost subconsciously...Operators are coming to see that sound is as influential as taste and smell and sight."

"Sound System Design Important to Customer Experience" Hospitality Management, December 1993.

SESAC submits that the principle set forth in Justice Holmes' opinion applies today. Establishments may and do benefit from performances of copyrighted works on premises.

As the establishment receives a benefit from using copyrighted works, it is only fair that the creators and owners of the copyrighted works receive compensation. The current copyright law is a carefully thought out and crafted balancing of the interests of both the users and the owners of copyrighted works. SESAC opposes H.R. 3288 and urges the Committee not to recommend its passage.

CONCLUSION

SESAC is grateful to the Committee for this opportunity to summarize SESAC's licensing activities and to express its opposition to H.R. 3288.

Mr. HUGHES. Mr. Gould, the record will remain open for you to respond, and any of the other panelists, if you wish to submit additional testimony to respond to any testimony that will be heard either after your panel or tomorrow in the panel discussions.

Section 14 of ASCAP's amended consent decree requires it to inform any prospective licensee whether a composition is in ASCAP's repertoire. ASCAP is also required to prepare and maintain a list of all musical compositions by title, date, or copyright and author.

My question is directed toward any one of the three societies, not just ASCAP. Given the tremendous capabilities of computers today, why shouldn't you provide an online service? After all, the airlines have remarkable computer programs for fare schedules, fees, and reservations. Why shouldn't you be able to do the same thing?

Mr. KOENIGSBERG. Mr. Chairman, I am Fred Koenigsberg, ASCAP's special counsel. I am grateful to you for allowing me to come up and answer the questions that you've asked.

There are a couple of points in response to the question you asked. Number one, you must realize that ASCAP's repertory—and I believe it is true of BMI and SESAC as well—expands from the instant a copyrighted work is created. That is to say, from the instant a songwriter's pen lifts from paper, that work is in the ASCAP repertory. Obviously, a list of works in the repertory can only be up to date as of the moment it is either printed, or the moment it is put into a computer data base, to take the second part of your question.

Mr. HUGHES. Well, isn't that true of airlines too? Airlines have to continually update.

Mr. KOENIGSBERG. Certainly, that's true.

Mr. HUGHES. Their schedules change, chartered, unchartered changes, fares change. They have to continually update.

Mr. KOENIGSBERG. Sir, you are absolutely right. The second part of the answer to your question is that ASCAP is looking at some sort of online access that folks who are not ASCAP members as well as ASCAP members can have to consider or to learn whether a song is or is not in the ASCAP repertory, and to get information about it—who the writers are, who the publishers are, and get information about it.

So what you are suggesting is very much in ASCAP's thinking at the moment.

I would tell you, sir, that right now what ASCAP does is it tells every user, without exception, every user that if they want to know if any particular works are in the ASCAP repertory, tell us what they are and we will very promptly get back to them and tell them whether the works are or are not ASCAP compositions and included in the ASCAP license. We do that for a great many users who make those requests to us.

Mr. HUGHES. Well, one of the complaints I hear is that you do not provide that information, and users cannot basically determine whether or not a particular composition is licensed by ASCAP or BMI.

Mr. KOENIGSBERG. Sir, all I can say from ASCAP's perspective is that is simply not the case.

Mr. HUGHES. Yes, Mr. Berenson.

Mr. BERENSON. May I, Mr. Chairman? BMI is similar to ASCAP. We have a special department, a research and information department, that is available by telephone, and/or to which written inquiries can be made, and BMI will answer the questions and the inquiries made as to whether certain musical composition are in the BMI repertoire. We do make that service available.

Mr. HUGHES. Do you have the capability of providing a printout? Could I access by computer today?

Mr. BERENSON. No. We do not have that capability. BMI's repertoire, similarly to ASCAP—I think ASCAP has a larger repertoire——

Mr. HUGHES. Why don't we provide that capability? It seems to me——

Mr. BERENSON. Pardon me?

Mr. HUGHES. Why do we not provide that capability? It seems to me that would be rather simple to provide, state of the art.

Mr. CANDILORA. I can tell you, Mr. Chairman, that SESAC does provide a printed out listing of its repertory whenever a user requests that. We do, however, find that we have to charge them for the time that it takes to run that extensive repertoire and the paper, and most of the times when they look at what the cost will be, they decline to pay those costs to really review the repertoire.

Mr. HUGHES. Your repertoire is much smaller.

Mr. CANDILORA. Yes.

Mr. HUGHES. It is a fraction of ASCAP or BMI. We do, I understand, have a practical problem in providing that, but it seems to me that is the direction we need to go.

Mr. KOENIGSBERG. Mr. Chairman, we are looking at going in exactly that direction, and your opening really should be the closing on this. Remember, from ASCAP's perspective, we don't have a choice. We have to provide that information to users, and that is why say to you, sir, we always do.

Mr. HUGHES. We will hear testimony tomorrow from radio stations about blanket versus per-program licenses. I am intrigued by SESAC's pilot project for Hispanic stations whereby the stations will be charged only for what they broadcast.

It seems to me that the existing regime of making a list of repertoire reasonably available—and you say you dispute that—and the pricing of program license has made some stations take a blanket license when they would rather take a per-program license.

Additionally, consider how you pay royalties. Your writers' or publishers' royalties are not based on actual performances, but, as I understand it, by sample surveys and formulas that are developed by your society.

If the approach that SESAC is trying were used, it seems to me radio stations could be billed only for what they broadcast, and writers and publishers could receive royalties for what was performed.

Isn't digital encoding a better way to go than the present system?

Mr. BERENSON. This may be in the future, Mr. Chairman, however today, with all due respect, BMI did look into the BDS system. It is not a system which can be utilized today in BMI's estimation.

As an example, we feel that there are not enough sites to get the information. Additionally, if there was a rendition of "My Way,"

Mr. Chairman, and there were 40 different versions of "My Way" you would have to encode into the computer each of the 40 different versions. If you did not do that, you would not be able to ascertain whether that work was actually performed. This may be available in the future. With technology as it exists today, we do not feel that it is readily available and cannot be made available.

Mr. HUGHES. One of the toughest jobs, but one of the most important jobs of this subcommittee is to do the balancing that a number of you have mentioned, balancing the rights of users, society, that receive those works, and the rights of the creators of them to receive rewards, their just desserts, for their creativity.

In trying to balance that, we haven't always done a very good job. I think section 110(5) is a good example of an exception that wasn't very well drafted, and it has created a wealth of litigation.

But I am intrigued by the extent to which we've carried it, the present licensing regime. All three societies license television stations and receive substantial royalties for those licenses. If a tavern has two 9-inch television sets, your position, I think, is that the section 110(5) exemption is unavailable.

Let me ask you, does that make sense to even you?

Mr. KOENIGSBERG. There are a couple of parts to your question, sir, if I may address them. One is the point that you make about television stations paying license fee.

The television license and the radio license agreement that ASCAP has—and I am sure it is true of BMI and SESAC as well—specifically excludes the additional performances that are being made by public establishments when they use those transmissions and communicate them to the public for their own benefit.

Now, does it have to be that way? We recognize, and I would hope we all recognize, that songwriters should be paid for those performances. We could, I suppose, license the television or the radio broadcasters to encompass those performances as well. They would have to pay the fees for those performances as well. And if our good friends and customers, the radio and television broadcasters, were up here and you asked them if they would be willing to pay those additional amounts, I don't know what their answer would be, but I could make a guess. They might say, "We are not benefiting from it; the establishment is benefiting from it, let them pay for it."

The second question about the two 9-inch television sets, "Does it make sense?" Well, it makes sense in the context of the purpose of section 110(5), which was to exempt the small establishment, which was making a use that really wasn't a significant use at all. That section had its origin, sir, in the licensing practices of ASCAP after a Supreme Court decision in 1931 when ASCAP said we are not going to license places that have just a small table model radio behind the counter. They will turn it off, first.

Mr. HUGHES. You are not suggesting to me, are you, that you are going to define a small establishment by whether it has one 9-inch or two 9-inch television sets, or a 27-inch television set, or a 36-inch television?

I served as a bartender many years ago. A great job, I might say.

[Laughter.]

Mr. KOENIGSBERG. I was a busboy myself. I know what you mean.

Mr. HUGHES. You had to listen to confessions. You didn't have to solve any problems. This bar had two small television sets. That was when television was just coming into its own, but it is because they wanted the patrons at both ends of the bar to be able to see it. You almost had to have a magnifying glass to see it anyway in those days. But you are not suggesting that that makes sense?

Mr. KOENIGSBERG. Sir, this committee when it enacted this part in the 1976 act, focused on the significance of the use to the establishment, and thought that any use of multiple sets was too significant to be exempt. I think that is what Congress has done; that's the law as we find it, and that's the law that our members must live by, and we all must live by.

Could the law be clarified? Could section 110 be clarified? No sane person would say to you that it could not. Should the exemption contained in that law be expanded? We say emphatically not.

Mr. HUGHES. How did you arrive at the 27-inch standard?

Mr. KOENIGSBERG. There are different standards.

Mr. HUGHES. How did you arrive at the 36-inch standard, ASCAP?

Mr. KOENIGSBERG. The term used in the law is what is a single receiving apparatus of the kind commonly used in private homes. ASCAP took a look at statistics on what sorts of sets were sold, how many, where, when, projection, nonprojection, size of screen and so on, and came to that conclusion as to what a reasonable interpretation of what is "commonly used" would be. That is the simple answer.

Mr. HUGHES. Of course, that is all changing.

Mr. KOENIGSBERG. It changes. It is constantly changing, and has to be constantly reevaluated.

Mr. HUGHES. But does it make sense to base it upon that kind of a standard? It may very well be that Congress did contemplate your current interpretation when section 110(5) was drafted. I kind of doubt it, though. I don't think Congress ever dreamed that we would end up with this kind of an interpretation. Maybe my colleagues then did. I'm not sure, but it certainly does not make sense. With technology changing and with consumer demands changing, that seems like a senseless criteria to be used. Wouldn't you agree?

Mr. KOENIGSBERG. Well, sir, I remember the 1976 act. I was around then. I remember talking to Congressmen and Senators and their staff people on it. What Congress intended at the time was that the standard not be frozen for all time, but rather be flexible in terms of what is "commonly used" from time to time.

Now, would it make more sense to have a rigid standard that would be uniform in application, that would not expand the exemption, but would be clear? Perhaps the answer to that is yes.

Mr. HUGHES. Let me ask you an additional question and then I am going to yield to my colleagues who have a number of questions I'm sure.

At least with ASCAP you charge almost twice as much for mechanical audio with audiovisual than for mechanical audio only.

What is the justification for that since you do not license audiovisual works?

Mr. KOENIGSBERG. The justification, sir, is that the use of music in conjunction with audiovisual images is, on a relative basis, more valuable than the use of music alone in retransmissions.

The use of music in a bar when you have MTV up there is more powerful than just when you have a radio set playing in the background, and that's the thought. I should add to you, sir——

Mr. HUGHES. But you do not license audiovisual?

Mr. KOENIGSBERG. We license the music in the audiovisual works, but not the audiovisual part of it themselves. We cannot; we do not have those rights.

Mr. HUGHES. So it is a judgment you have made that is enhanced by twice as much?

Mr. KOENIGSBERG. Yes, sir, and I would add that we have tried repeatedly to sit down with the folks on the other side: the National Licensed Beverage Association, the National Restaurant Association. We would be delighted to sit down with them—and perhaps you can encourage them to do so—and talk about this, and work out arrangements that we can all be happy with. We would be delighted to do so. We have tried.

Mr. HUGHES. That is why we are here today.

Mr. KOENIGSBERG. We have tried, and we would very much like to do that.

Mr. HUGHES. Good. The gentleman from Rhode Island.

Mr. REED. Thank you, Mr. Chairman. I would just like to clarify something I think that was said in passing and that is that there currently exists an exemption covering these small establishments, so no one is really quibbling with the notion that some exemption should be made for the incidental use of music.

The question seems to be how do you define that so that you create a situation in which artists can realize the rewards of their efforts, but at the same time small businesses are not caught up in what they object to as—I do not know what the right term would be—but a system in which they have little voice, that is, in effect, a monopoly demanding that they pay, and that it is not fair. You have heard the litany.

Am I to suppose from the testimony here today that you are not opposed to clarifying the systems so that we can get away from this kind of legal gap, this legal process which is so awkward.

Mr. KOENIGSBERG. From ASCAP's perspective—I'm sure it is true of BMI and SESAC—obviously we cannot sit down together because of the antitrust laws, but we would be delighted, nay, ecstatic to sit down with these good people and see if we could clarify with them an understanding of what is and what is not exempt, and indeed work out the terms of the license. We have been trying to do that, sir, for a long time.

Mr. REED. Well, the purpose today is essentially to leap over the logjam and to legislatively clarify it. I guess my real question is that I take it that there must be some legislative language which you would hypothetically agree would be helpful in terms of clarifying this, so that everyone understands, and that there is not the litigation and all of the confusion, which is, really, a cost to both ASCAP and BMI system and the small business community.

Mr. KOENIGSBERG. If we could sit down and work things out with the trade associations which represent the bulk of the users here, under the current legislation, which I think could be done, there would be no need for Congress to address this issue.

Could anyone come up with language? Of course, anyone could, but the point here is that we would much rather do it with the users, which is the way I think you would much rather have us do it as well.

Mr. REED. I am really concerned of the impact on small business, and it seems to me that in this stalemate situation that ASCAP, BMI and all the agencies have the upper hand. We would like to see, I think, if you could settle it yourselves, do so, but it hasn't been settled for a while. It is a growing and increasing problem. I think it is one in which we have to move with much more decisiveness to fix. Again, you are not talking up or you cannot get together; I think we should do that.

Mr. BERENSON. I think as Mr. Koenigsberg said it is far better if the individual users and the organizations get together to resolve the problems, but we keep talking about small users, incidental users.

The problem is what is "incidental"? As Chairman Hughes said, he was recently in a restaurant, they played radio, and he liked the ambiance of which music was a part. As I mentioned in my address, Supreme Court Justice said, if it wasn't profitable they wouldn't be using it, they could pull the music.

Studies have been done, when you go into restaurants, the ambient music—what has been referred to here as "incidental music"—keeps fannies in the seats, as George Steinbrenner once said. People sit in a restaurant longer because of music.

Or, conversely, Muzak will often offer music which is played at a faster beat to get people out of a restaurant, to eat faster. It serves the benefit, basically, of the proprietor to use music, and, as I've said before, to require a songwriter to be the only one to give his property as a gift free, mandated by Congress, is wrong.

There has to be negotiation between the users and the performing rights organizations, and that is what should go on, but no one should be forced by Congress to make a free gift.

Mr. REED. There is a certain free gift already written into the present language, is that correct?

Mr. BERENSON. Yes, there is.

Mr. REED. Well, we have already done that.

Mr. BERENSON. But what we are saying is that it should not be expanded.

Mr. KOENIGSBERG. And, sir, back in 1976, we did not oppose that exemption. Quite the contrary. That exemption was designed to codify what our licensing practice was. It took a slight additional twist, but that was fine with us. I remember it very vividly.

Mr. REED. Again, I appreciate your testimony, and I appreciate the fact that you are raising some very fundamental issues about property rights, who should enjoy them, and whether they should be with or without a benefit.

Again, I think we should move to clarify this issue. It seems to be one of these areas of massive litigation, and if we can make it cleaner and clearer I think we would all benefit.

Thank you, Mr. Chairman.

Mr. HUGHES. Thank you. The gentleman from California, Mr. Berman.

Mr. BERMAN. Thank you, Mr. Chairman. I apologize for missing our colleagues' testimony and the testimony of this panel. Unfortunately, the Budget Committee and the Foreign Affairs Subcommittee are both meeting at the same time and I have to go back to those. I am not going to be able to stay very long.

I take it the issue is about whether section 110(5) and the legislation before us seeks to exempt music played at restaurants or bars from any coverage of a requirement that the proprietors of those establishments get licenses.

Mr. HUGHES. That is correct. The question is what is incidental use? It has created a lot of confusion and chaos. That is the focus of this hearing as part of the oversight of copyright generally.

Mr. BERMAN. This question of incidental use—I am sort of mulling this over in my own mind and sharing it with everybody here. In television programming, my guess is that television programmers could try to claim that the music that accompanies the television program, in some cases it is probably only a few minutes of the television show, is incidental to the show, and that people want to watch the show and the music isn't what's really causing them to watch that show, therefore, other than paying the people who made the music or paying for the recording that is used, why should they have to get a license for the music.

I am just wondering how one can claim it is incidental, and at the same time people feel enough need to want to use the music that they are either paying the license for or fighting to get an exemption from having to pay from the license rather than refraining from using the music?

Why, to some extent, isn't the marketplace a determiner of whether or not it is so incidental that it doesn't need to be used, or is not worth the price that is being charged for it? And with that rhetorical question I will yield back the balance of my time.

Mr. HUGHES. I thank the gentleman. The gentleman from California, the ranking Republican.

Mr. MOORHEAD. Thank you, Mr. Chairman. I want to apologize to the panel. I am the ranking member of the Energy and Commerce Committee, and I have been down there doing my work this morning, so I haven't been here.

But I cannot emphasize too strongly the importance of the parties involved here getting together. I know that none of you are going to get exactly what you want. You have to compromise, but I think there is a very, very great need to get together and try to work this out without having a legislative solution imposed on you.

There seems to be some lack of clarity in section 110(5) of the Code, and some difference of interpretation as to the size of the TV sets involved between BMI and ASCAP. That seems to be something you guys can work out together, I would think, without a whole lot of effort.

I can understand the feelings of the people that write this music, that they have a right that needs to be protected. I do not like legislation that disturbs that right, but I think there is enough of the

working details here that something can be worked out and must be worked out between the parties if it is at all possible.

I hope that for the next few months you will really work hard. Maybe a few months is too much; maybe the chairman doesn't want you to wait that long; he's given you 1 month, but do everything that you can to get together on this. It is always much better to work something out than it is to have Congress impose something.

Mr. KOENIGSBERG. Congressman, we would avidly embrace your suggestion, and we can only hope that the good people on the other side would equally avidly embrace your suggestion.

Mr. MOORHEAD. Well, if one side is working on it and is serious about it, and the other side is not, it might very well affect the way we feel about it. I would hope that all of you on both sides will work together to try and work this thing out.

I would personally like to know if one side or the other is refusing to negotiate. That would be important to me.

Mr. BERENSON. May I just say, Mr. Moorhead. You did miss part of my presentation as you stated. BMI has been in negotiation with the New Jersey Restaurant Association and other State restaurant associations in an attempt to arrive at mutually acceptable master licenses which would obviate this problem.

I speak only for BMI, we have been attempting to do so and will continue to do so.

Mr. MOORHEAD. If the chairman has said a month, if you are within a couple of weeks of coming to a conclusion, I am sure he might give you 6 weeks, but I would like to know what progress you are making. Mr. Gould, If you would report back the progress that is being made 2 or 3 weeks from now, so that we can have some kind of idea if we are going to move forward. I have nothing further.

Mr. HUGHES. Thank you. I just have one additional question. Mr. Gould, on page 6 of your statement you mention that a bar or restaurant that does not think your fee is reasonable can go through the rate court in the Southern District of New York, in which case ASCAP bears the burden of proving its rates are reasonable.

How likely is it a restaurant owner in my area, southern New Jersey or in Wyoming or Arizona for that matter, would pay a lawyer to contest your decision to charge for a 36-inch television or any other fee? How many times have ASCAP's fees been challenged in the rate court by small food and restaurant establishments?

Mr. KOENIGSBERG. How likely is it that an individual establishment has the wherewithal to do it?

Mr. HUGHES. Do you think it is realistic to think that one of my tavern owners in southern New Jersey is going to go to New York, over a $300 or $400 fee, and contest it? Lawyers in my neck of the woods do not charge as much as the big city lawyers in New York, as I understand. I have been out of practice for a long time, but I think it is unrealistic to think that they would, don't you?

Mr. KOENIGSBERG. But, sir, trade associations certainly have the wherewithal to do that, and these things can be done quickly if both sides want to do it, and ASCAP always would like to do it quickly. So I do think that it can be done because if there is a concern here, it is not a concern of one bar owner, it is a concern of

many bar owners, if it is a legitimate concern. Therefore, a trade association, such as the associations that are appearing before you in these hearings, or such as the New Jersey Association, certainly, could do so.

Mr. HUGHES. How many times has the New Jersey Restaurant Association brought suit?

Mr. KOENIGSBERG. To my knowledge, none. But there are users of music in this area who have come to court. I remember one time where a chain of fast food restaurants went to court contesting this sort of fee which amounted for them to about $150 to $200 a year per premises.

The judge who has jurisdiction over the consent decree requires that all parties come before him before they file a motion, which is a good way of seeing if things can be worked out. He said to them, well, obviously you can file your request for a fee determination, but when you are talking about $150 a year or $200 a year, how low, he said, can I make the fee?

The burden is going to be on ASCAP to prove that that's a reasonable fee.

Mr. HUGHES. Let me ask it another way. The Federal district courts are up to their eyeballs in civil cases today. Sometimes it takes 3 and 4 years to reach a case, not to mention lawyers. Even lawyers down my way, rural southern New Jersey, require a $4,000 or $5,000 retainer to go into Federal district court, and by the time they get into discovery, pay for that, you're talking about big dollars.

What would be wrong with developing a system of, let's say, court-annexed arbitration?

Mr. KOENIGSBERG. I must say, sir, that I am not sure that the scenario that you paint is really accurate. I do not think that it is that difficult for trade associations——

Mr. HUGHES. You do not think it is accurate that lawyers down my way are requiring those retainers in Federal district court?

Mr. KOENIGSBERG. That I would never contest, sir.

Mr. HUGHES. Because I have four kids that are lawyers in southern New Jersey.

Mr. KOENIGSBERG. I hope my kids follow in those footsteps too, but bringing such a proceeding does not have to be a big deal. It can be done quickly, and the district judge, Judge Conner, who is the judge over the ASCAP consent decree, always wants to move these things very quickly. It doesn't have to take 3 years.

Mr. HUGHES. What is wrong with an arbitration process? Why should this be something that clogs the district courts?

Mr. KOENIGSBERG. Sir, without answering that off the top of my head, let me think about that and talk to my client about that. That is the safe answer for a lawyer to give.

Mr. HUGHES. Good. You have been very, very helpful. Like my friend Carlos Moorhead here, I hope it is something that the industry can solve. That was music to my ears that you would want to sit down and try to work it out with the users because that is a far better approach.

I think that 110(5) just invites the kind of chaos that we've seen, so I am not adverse to modifying that, perhaps, even if the user

community and societies can work it out more amicably to try to deal with the problem.

Certainly, having you folks talk with the users would be a far preferable way to try to resolve this issue, it seems to me, in the long pull.

Anyway, it has been very helpful. I do not think there are any questions, but there are so many things in intellectual property that are not relevant to changing times that we need to update our laws because I really believe Morton's remark in the early part of his statement about our commitment to maintaining the right balance.

With the technology that is ongoing that is changing the entire landscape, it is so important for us to maintain that balance, to protect the rights of the creators' property.

I want to tell you something my restaurant folks told me. That they didn't even think that they should be paying for live music, which I told them was nonsense. I did not want to hear that because that does not anywhere near maintain the kind of balance we are talking about.

With incidental use, it is an area that is a thicket, and I think that we can sort it out and come up with something a lot more rational than we have today. I hope we can do that.

Thank you. You have been very helpful today.

Our second and final panel consists of Joe Johnson and Michael Leonard appearing on behalf of the National Licensed Beverage Association, and Henry John Deion and Guy Gregg representing the National Restaurant Association.

Mr. Johnson operates two restaurant businesses in New Jersey. He is the president of the Atlantic County Licensed Beverage Association, and is an executive board member of the New Jersey State Licensed Beverage Association.

Mr. Johnson's biography states that one of his establishments, Rod & Reel, has been the favorite watering hole of New Jersey sportsmen since 1936. I look forward to visiting you in the years ahead.

Mr. Leonard has been in the restaurant business for almost three decades. He now owns the Greenbaum & Gilhooley Restaurant in Wappinger Falls, NY, and is the executive vice president of the United Restaurant, Hotel, Tavern Association of New York State.

Mr. Gregg has been working in the restaurant business since 1975. He is the founder and owner of 3 Cheers, Inc., and Publick House Restaurant in Chester, NJ. He has been a member of the National Restaurant Association since 1979.

Since 1986, he has served on the board of directors of the New Jersey Restaurant Association and is currently vice president. Mr. Gregg holds a bachelor of arts in psychology from Monmouth College in Illinois.

Mr. Deion is also a member of the National Restaurant Association and owns, among other businesses, the Last Saloon in Providence, RI. He is a graduate of Colgate University.

On behalf of the members of this subcommittee, we welcome you here today. We have your statements, which we have read. We hope you can summarize for us, but we are going to let you proceed

as you see fit. Your statements will be made a part of the record in full.

Why don't we begin with you, Mr. Johnson. Would you like to begin?

Mr. JOHNSON. Yes, I would.

STATEMENT OF JOE JOHNSON, ROD & REEL TAVERN, BRIGANTINE, NJ, AND PRESIDENT, ATLANTIC COUNTY CHAPTER, NEW JERSEY LICENSED BEVERAGE ASSOCIATION, ON BEHALF OF THE NATIONAL LICENSED BEVERAGE ASSOCIATION

Mr. JOHNSON. Mr. Chairman and members of the subcommittee, I am Joe Johnson. I am the owner of the Rod & Reel Tavern in Brigantine, NJ. I am the president of the Atlantic County Licensed Beverage Association. I am here today representing the National License Beverage Association. That is quite a mouthful.

In essence, I think what I am here doing is representing the little guys that we have been talking about. I would like to depart to say that some of the previous testimony bears out the inferences that we have made.

If you ask a composer a question, you get an answer from a lawyer, and that doesn't sit in terms of what they have been saying, their willingness to negotiate. If you ask question of a composer, you get an answer from a lawyer.

The other thing I really liked was the analogy that they used in the presentation of the loaf of bread or the baker in bringing in your bread. Of course, I have a baker. He does bring in my bread, and I gladly and happily pay him for the bread, but I certainly wouldn't expect that after the baker left that in the door would walk a man who said that he had the rights to the recipe for the bread, and he expected to be paid also after the baker had already paid him for the use of the recipe.

Essentially, as I see it, that is what we are talking about here today. I would like to thank Mr. Gould for the analogy.

I would like to compliment the members of the subcommittee including my Congressman, Representative Hughes, from my district. Unfortunately, I understand that is not going to continue, much to my chagrin, and I could say to the chagrin of most of your constituents after 20 years of service, admirable years of service I might add. I am very sorry to hear that you are not going to continue in the Congress of the United States.

I would like to thank you for having the foresight to hold these hearings on the rights of the societies. I believe that this is the first hearing to focus on the many problems that we in the hospitality industry face every day in dealing with the agents of the performing rights societies.

We recognize that all of our problems are not addressed in this legislation. We are, however, urging you to consider and to pass H.R. 3288, the Public Accommodations Exceptions Act.

In many cases, owners of establishments have no recourse but to pay fees or face litigation from the performing rights societies.

The problems include the total lack of information on song titles that each group claims it owns; the arbitrary imposition of fees based on a matrix of criteria that most small businessmen cannot

understand; the lack of accountability by the performing arts societies for the fees they collect throughout the country; and the question of charging, not just once, but several times, for music that is played on radio and television broadcasts resulting in double and triple dipping for the performing rights societies. These problems all have a negative effect on small business operations.

Mr. Chairman, there is not a single issue that arouses more anger in the hospitality industry than the issue that you have before you today.

Mr. Chairman, what concerns me most about the issue is the lack of understanding by the performing rights societies of our retail industry's positive position relative to the incidental use in our establishments of radio and television transmissions, cassettes, CD's, and other types of recorded music commonly found in the home.

These televisions, radios, and players are turned on for our customers enjoyment. There is little economic advantage to us. We simply provide background music in the dining room or have a television for our customers at the bar. The customers expect service, food and drink, and a relaxed atmosphere.

For the performing rights societies to charge fees for the incidental use of televisions, radios, and other players is simply outrageous.

I am here today to urge your positive vote for this first step in correcting many of these abuses in H.R. 3288, the Public Accommodations Exceptions Act. This is not a New Jersey problem; it is a national problem in our industry.

A member of the Montana Association recently wrote the National License Beverage Association that they have two television sets in their lounge. One is a 19-inch, the other is a 36-inch. ASCAP wanted to charge them for both televisions, even though the owner insisted that the televisions are of the type commonly used in the home, and were not assessable by ASCAP. They wanted $300 a year for one of the TV's.

This is the way they interact with our members. I have personal examples throughout New Jersey. The issue is simple. If an establishment does not charge admission for customers specifically to hear radio and television transmissions, then we should not have to pay a fee for simply turning on the television, radio or other player.

It seems, Mr. Chairman, that all three performing rights societies have various price structures relating to televisions, radios, and other players in our establishments. There is no consistent standard on homestyle exemptions relating to television size.

It is possible, Mr. Chairman, for one performing rights society to require a license for a 27-inch television and another to require a fee for a 36-inch television. It is unfair to allow these inconsistencies to continue especially where we already pay for cable network access to programming.

Mr. Chairman, we already pay fees to the performing rights societies for live music and music on our jukeboxes. I notice that the copyright law presently provides an exemption from fees for the playing of records in record stores which promote the sale of

records, and at agricultural fairs and a whole list of other activities that are exempted in the law.

Mr. Chairman, television and radio technology has greatly changed in the past 18 years. Our legislation is narrowly drawn to provide for another exemption under the law. In 1976, Congress passed the copyright law that exempted music played on a single apparatus of the type commonly used in private homes.

It is time for Congress to update the homestyle exemption and pass H.R. 3288 this session of Congress.

Thank you.

Mr. HUGHES. Thank you very much, Mr. Johnson.

[The prepared statement of Mr. Johnson follows:]

Prepared Statement of Joe Johnson, Owner, Rod & Reel Tavern, Brigantine, NJ, and President, Atlantic County Chapter, New Jersey Licensed Beverage Association, on Behalf of the National Licensed Beverage Association

Mr. Chairman and members of the subcommittee, I am Joe Johnson, owner of the Rod & Reel Tavern in Brigantine, New Jersey, and the president of the Atlantic County Chapter of the New Jersey Licensed Beverage Association. Today I am representing the National Licensed Beverage Association, which is composed of members of the retail alcohol beverage industry.

I would like to compliment the members of this subcommittee, including my congressman, Rep. Bill Hughes, for having the courage and foresight to hold this hearing on the performing rights societies. I believe that this is the first hearing to focus on the many problems we in the hospitality industry face every day in dealing with the agents of the performing rights societies. We recognize that all of the problems are not addressed in the legislation we are urging you to consider and pass, H. R. 3288, the Public Accommodations Exception Act. In many cases, owners of establishments have no recourse but to pay the fees or face litigation by the performing rights societies. The problems include: the total lack of information on the song titles that each group claims as its own; the arbitrary imposition of fees, based on a matrix of criteria that most small businessmen cannot understand; the lack of accountability by the performing rights societies for the fees they collect around the country; and the question of charging not just once but several times for music played on radio and television broadcasts, resulting in double and triple dipping payments to the performing rights societies. These problems all have a negative effect on our small business operations. Mr. Chairman, there is not a single issue that arouses more anger in the hospitality industry than the issue that you have before you today in this hearing.

Mr. Chairman, what concerns me the most about this issue is the lack of understanding by the performing rights societies of our retail industry's position relative to the incidental use in our establishments of radio and television transmissions, cassette tapes, CD players and other types of recorded music for use in the home. These televisions, radios and players are turned on for our customers' enjoyment. There is little economic advantage to us in having pleasant radio or other background music in a restaurant or in having a television on the bar for our customers. The customers expect service, food and drink in a relaxed atmosphere. For the performing rights societies to charge fees for this incidental use of televisions, radios and other players is simply outrageous.

I am here today to urge your positive vote for this first step in correcting many of these abuses by passing H. R. 3288, the Public Accommodations Exceptions Act. This is not just a New Jersey problem, it is a national problem for our industry. A member of the Montana Tavern Association recently wrote to the NLBA that they have two televisions in their lounge: one is 19", the other 36". ASCAP wanted to charge them for both televisions, even though the owner insisted that televisions that are customarily used in the home cannot be assessed. ASCAP wanted $300 per year for one of these televisions. This is the way they interact with our members. I have personal examples throughout New Jersey.

The issue is simple: if an establishment does not charge admission for customers to specifically hear radio and television transmissions, then we should not have to pay a fee for simply turning on a television, radio or other player. It seems, Mr. Chairman, that all three performing rights societies have varied price structures relating to television, radios or other players in our establishments. There is no consistent standard on homestyle exemption television size. Is it possible, Mr. Chairman, for one performing rights society to require a license fee for a 27" television and another to require a fee for 36" television? It is unfair to allow these inconsistencies to continue, especially since we pay fees to cable networks for access to programming, for live music performances, for jukebox music and, yes, Mr. Chairman, fees to the performing rights societies under the copyright law. We need to clarify this issue, and H. W. 3288 does just that. I notice that the copyright law presently provides an exemption from fees for record stores, to promote the retail sale of records, and for agricultural fairs.

Mr. Chairman, television and radio technology has greatly changed in the last 18 years. Our legislation is narrowly drawn to provide for another exemption under the law. In 1976, Congress passed a copyright law that exempts music played on a single apparatus of the type commonly used in private homes. It is time for Congress to update the homestyle exemption and pass H. R. 3288 this session of Congress.

Mr. HUGHES. Before I recognize Mr. Leonard for his testimony on behalf of the National Licensed Beverage Association, let me advise you that I asked Congressman Don Edwards to chair for a while.

Instead of recessing for an hour at noontime, an hour and a half, because I have a direct conflict at noontime, I am going to continue because of the bad weather, and take the rest of the testimony.

But I have read your statements and I will examine the transcript, and I want to say I appreciate your coming, in some instance, a fairly long distance.

I will ask at this time if Don Edwards will chair, and I know that my colleague has the same conflict. Would you like to be recognized?

Mr. REED. Yes, Mr. Chairman. Thank you very much. Both you and I will be going down to visit with the Attorney General, so we beg your apology for leaving, but I will have a chance later to see John and talk to him. I appreciate your testimony and coming here today. Thank you very much.

Mr. EDWARDS [presiding]. Thank you, Mr. Chairman. I am honored to temporarily chair this very distinguished subcommittee that I am always pleased to be a part of. I apologize because of the scheduling of our work today. I was supposed to be at three places at once, and it is very difficult to divide yourselves into three parcels, although I have people who would like to divide me, and do worse.

You are also going to help educate me and other people because I was not able to be here for the beginning of the testimony, but thank you for being patient.

Mr. Leonard, you may proceed. Without objection, all four statements will be made a part of the record.

STATEMENT OF MICHAEL LEONARD, OWNER, GREENBAUM AND GILHOOLEY'S RESTAURANT, WAPPINGER FALLS, NY, AND EXECUTIVE VICE PRESIDENT, UNITED RESTAURANT, HOTEL, TAVERN ASSOCIATION OF NEW YORK STATE, ON BEHALF OF THE NATIONAL LICENSED BEVERAGE ASSOCIATION

Mr. LEONARD. Mr. Chairman and members of the subcommittee, I am Mike Leonard, owner of Greenbaum and Gilhooley's Restaurant in Wappinger Falls, NY. I am the executive vice president of the United Restaurant, Hotel, Tavern Association of New York State, and I am here today representing the National Licensed Beverage Association.

In my home State of New York, our members are constantly experiencing problems with music licensing. This has increased dramatically during the past few years as the licensing societies have prioritized the licensing of televisions.

Our most serious problem stems from the confusion over the homestyle exemption, especially at it relates to televisions. The law provides that the exemption applies to equipment commonly found in the home, but does not define this any further.

The provision is so confusing, that the two most prominent licensing organizations, ASCAP and BMI, interpret the exemption differently. BMI has determined that any single television measuring 27 inches diagonally or larger is equipment not commonly

found in the home. ASCAP has determined that any single television measuring 36 inches or larger is not commonly found in the home.

According to both of these licensing organizations, any single unit larger than the limit they have established requires a licensing fee. To the best of my knowledge, this determination was made solely by the respective organization.

In fact, in a meeting with representatives of ASCAP in April 1993, which was arranged by Chairman Hughes, we were informed that ASCAP came to this determination based upon sales figures for television in the United States in 1990. According to their representative, 40 million televisions were sold in the United States during that year of which 2 million were 36 inches or larger.

Their information did not include where these televisions were located—home or commercial establishment—nor have they reviewed sales data since then.

It is inappropriate for the licensing groups to determine the interpretation of the homestyle exemption. A cursory review of any advertising circular from a major appliance store will show that televisions 27 inches, 36 inches or larger are regularly marketed for home use.

I also do not understand why I have to pay a license fee to these music licensing groups for my televisions. I do not use MTV, VH–1 or any other music programming as part of my business. I have been told I have to pay for the music used in the commercials broadcast over my televisions and for the background music used on various TV programs.

This does not make sense to me. I do not receive any benefit from the music played in the commercials or in the background of television programs. These companies whose products are being sold through my TV should be responsible for the fees, not me.

For any programs that have music in the background that I receive as part of my cable TV subscription, I pay a monthly fee to my local cable company.

Our experiences in New York also demonstrate how the tactics of ASCAP and BMI make music licensing hard to swallow. For example, when I was contacted by my ASCAP representative and the required licensing of my televisions was explained, I reluctantly agreed to obtain a license. I was told how much the annual license fee would be, but when I received my license agreement in the mail, it was backdated 6 months, effectively doubling the rate I would have to pay.

My experience is not unique. The music licensing organizations avoid offering a clear definition of the homestyle exemption for us. You have to read their material very closely. Why not be straightforward in stating their policy? Then everyone would know the rules and comply instead of misleading many establishment owners.

The fee schedules that ASCAP and BMI have imposed upon us are also unfair. The fee schedule itself is extremely arbitrary. How are these fees developed? It is hard to understand how the fees for music licensing for a typical establishment can exceed the liquor license fee, the primary product of our establishments.

We have requested an opportunity to meet with ASCAP and BMI to discuss fees, but they are not interested in addressing this concern.

The adoption of H.R. 3288, a limited exemption to the copyright law, will address a significant portion of our music licensing problems. It will benefit our industry, the work force, the Government, and the economy.

I thank you for your concern and consideration, and I would also like to state that I have with me John Schwott and Scott Wexler, representatives of the National Licensed Beverage Association, to answer anybody's questions.

I thank you.

Mr. EDWARDS. Thank you very much for that good testimony. We certainly will have some questions.

[The prepared statement of Mr. Leonard follows:]

Prepared Statement of Mike Leonard, Owner, Greenbaum and Gilhooley's Restaurant, Wappinger Falls, NY, and Executive Vice President, United Restaurant, Hotel, Tavern Association of New York State, on Behalf of the National Licensed Beverage Association

Mr. Chairman and members of the subcommittee, I am Mike Leonard, owner of Greenbaum and Gilhooley's Restaurant in Wappinger Falls, New York. I am the executive vice president of the United Restaurant, Hotel, Tavern Association of New York State, and I am here today representing the National Licensed Beverage Association.

In my home state of New York, our members are constantly experiencing problems with music licensing. This has increased dramatically during the past few years, as the licensing societies have prioritized the licensing of televisions.

Our most serious problem stems from the confusion over the homestyle exemption, especially as it relates to televisions. The law provides that the exemption applies to "equipment commonly found in the home" but does not define this any further. The provision is so confusing that the two most prominent licensing organizations, ASCAP and BMI, interpret the exemption differently.

BMI has determined that any single television measuring 27" diagonally or larger is equipment not "commonly found in the home." ASCAP has determined that any single television measuring 36" diagonally or larger is equipment not "commonly found in the home." According to both of these licensing organizations, any single unit larger than the limit they've established requires a license fee.

To the best of my knowledge, this determination was made solely by the respective organizations. In fact, in a meeting with representatives of ASCAP in April of 1993, which was arranged by Chairman Hughes, we were informed that ASCAP came to this determination based upon sales figures for televisions in the United States in 1990. According to their representative, 40 million televisions were sold in the United States during that year, of which two million were 36" or larger. Their information did not include where these televisions were located--home or commercial establishment--nor have they reviewed sales data since then.

It is inappropriate for the licensing groups to determine the interpretation of the homestyle exemption. A cursory review of any advertising circular from a major appliance store will show that televisions 27", 36", or larger, are regularly marketed for home use. I also don't understand why I have to pay a license fee to these music licensing groups for my televisions. I don't use MTV, VH-1 or any other music programming as a part of my business. I've been told that I have to pay for the music used in the commercials broadcast over my television and for the background music used on various TV programs. This doesn't make any sense to me--I don't receive any benefit from the music played in the commercials or in the background of television programs. The companies whose products are being sold through my TV should be responsible for the fees, not me. For any programs that have music in the background that I receive as part of my cable TV subscription, I pay a monthly fee to my local cable company.

Our experiences in New York also demonstrate how the tactics of ASCAP and BMI make music licensing hard to swallow. For example, when I was contacted by my ASCAP representative and the requirement for licensing my televisions was explained, I reluctantly agree to obtain a license. I was told how much the annual license fee would be, but when I received my license agreement in the mail, it was back-dated six months, effectively doubling the rate I would have to pay.

My experience was not unique. The music licensing organizations avoid offering a clear definition of the homestyle exemption for us. You have to read their material very closely. Why not be straightforward in stating their policy? Then everyone would know the rules and comply, instead of misleading many establishment owners.

This happened to one of our members, who had paid a licensing fee for more than 10 years on a simple transistor radio. One day her field representative realized that this unit was clearly within the definition of the exemption and told her that a license wasn't required. But she was not entitled to a refund for a decade of fees paid unnecessarily, based on a "sales job" done on her many years in the past. The enactment of H. R. 3288 will prevent this from taking place.

Their unsavory tactics go further than just the issue of televisions and radios. In a case I'm familiar with, one of our members met with her field representative and agreed to obtain a license agreement based upon her use of music. When her check arrived in the ASCAP district office, she was notified that it would not be cashed until the remaining fees were paid. This was confusing, since she had paid the full license fee based upon her music use. After several additional attempts to collect extra fees, an anonymous telephone call was made to the pay telephone in her place of business, which a customer answered. The caller purported to be an interested patron inquiring about the frequency of music used in this establishment. She soon received formal contact from

ASCAP, informing her that they had confirmed her extensive use of music and demanding full payment or face legal action.

Recently, BMI sent a direct mail solicitation to almost all liquor licensees in New York State. The letter tells the recipient to sign the agreement, pay the appropriate fee, and send it back to BMI. There is no option provided to indicate that music is not used or that the music used is not required to be licensed. A more recent solicitation only slightly improves on this misrepresentation. In addition, all of the license agreements sent out with the second mailing were back-dated almost six months without any explanation.

The fee schedules that ASCAP and BMI have imposed upon us is also unfair. The fee schedule is developed by each group and dictated to our industry. Under a consent decree, ASCAP's fees are reviewable by the Federal District Court in New York, but how can any one of our members mount a legal challenge against an interest group as large as ASCAP? The legal fees to do this are prohibitive. Their rate structure provides an annual rate increase based on the consumer price index, and that's in addition to any increase in their base rate, as was imposed just a few years ago. As a businessman, I understand the need to increase prices to keep up with increasing operating expenses, but I could never get away with increasing the price of my meals each year to adjust for inflation and then adding in a little extra to widen my profit margin.

The fee schedule itself is extremely arbitrary. How were these fees developed? It's hard to understand how the fees for music licensing for a typical establishment can exceed the liquor license fee, the primary product of our establishments. We've requested an opportunity to meet with ASCAP and BMI to discuss fees, but they're not interested in addressing this concern.

Mr. Chairman, restaurants and taverns in New York State alone provide more than 100,000 jobs, with an annual payroll in excess of $1 billion. They pay almost $700 million each year in local, state and federal taxes, and generate more than $4 billion dollars annual in total business activity. but our ability to continue contributing at this level is threatened by ever-increasing burdens, such as having to pay license fees to use televisions in our establishments.

The adoption of H. R. 3288, a limited exception to the copyright law, will address a significant portion of our music licensing problem. It will benefit our industry, the work force, the government and the economy.

Thank you for your concern and consideration.

Mr. EDWARDS. Mr. John Deion, on behalf of the National Restaurant Association, you are welcome and you may proceed.

STATEMENT OF JOHN DEION, OWNER, LAST CALL SALOON, ON BEHALF OF THE NATIONAL RESTAURANT ASSOCIATION

Mr. DEION. Yes. Good morning, Mr. Chairman and committee members. I appreciate the opportunity to testify here today.

My name is John Deion. About 12 years ago I left a good job at John Hancock Insurance when my wife and I decided to renovate an old boiler room in a commercial building in Providence, RI. We turned it into a rhythm and blues club called the Last Call Saloon.

I totally agree with what my colleagues have said here today regarding bill H.R. 3288, and I fully support it. I also would like to see all incidental music included.

I would like to say that I agree with the basic premise of music copyright laws, and I agree that some fees should be paid by music users. And like Mr. Gregg and my colleagues here, I also would like to see the legislation go even further toward addressing the virtually unchecked powers of the music licensing organizations.

Specifically, I think this market needs an impartial, third-party mechanism other than the courts to deal with concerns and conflicts that may arise between establishments such as mine and ASCAP, BMI, and SESAC.

There is a wide perception in our industry that the enforcement of copyright laws is extremely arbitrary and inequitable. As a person who as paid fees to these organization over 12 years, I do not really know if every person who uses music in the State of Rhode Island is paying the same fee. I have asked, but have never been able to find out.

As it stands, the law from my perspective appears to be extremely one-sided in favor of the music licensing organizations.

Mr. EDWARDS. Aren't those records public? Can't you just ask for a printout of the fees for the State?

Mr. DEION. I have asked repeatedly, Mr. Chairman, if all, for instance, my competitors are paying fees and I have never been able to get a clear answer. There is no, to my knowledge, ability for me to discern that information. I have asked representatives from both BMI and ASCAP. In fact, very recently, I found out that one of my competitors had never been licensed with BMI until recently, and they had been in business 5 or 6 years.

Mr. EDWARDS. What was their response in writing?

Mr. DEION. It was never in writing. This was a verbal conversation. My BMI rep had met with me in the fall.

Mr. EDWARDS. Thank you.

Mr. DEION. If I may go on?

Mr. EDWARDS. Yes, proceed.

Mr. DEION. Any legal action on my part would be prohibitively expensive. Music licencing organizations know this, and I think treat us small business owners with a great deal of impunity. This environment has made small business easy targets for these large uncontrolled organizations. The music licensing organizations can charge virtually at will, without having to account for their activities to any governmental agency anywhere.

Certainly, they are not guided by the same forces of the economy and competition that we are. You may be aware, Mr. Chairman, that Rhode Island has endured particularly unpleasant economic conditions over the past 2 years.

They were made worse by the crash of many of our State's major credit unions a little more than 2 years ago. In that time, my business has had to cut back. If anything, the economic benefit that we get from music has diminished, not increased. My patronage is down. I have only sold out maybe a dozen times on show on the past 2 years. My revenue is down.

My wife and I have taken personal pay cuts. I have even taken to doing things like laying off the janitorial service and doing it myself in order to save money. But the breaking point for me was that in the middle of a significant downturn in my business, and I think in the business of everyone else, BMI and ASCAP wanted rate increases. ASCAP wanted as much as 20 percent.

In this economy, if I raise my prices by 20 percent, I would put myself out of business. The margins in this business wouldn't tolerate it. People would stop coming to my club.

But I am not a monopoly. I was faced with either paying the fee or going to court, and as I have said, and as my colleagues, court is not and option for us. Over the years, my attorneys have said to pay the money and to keep quite, so that is what I have done.

The other part of this issue that I would like to discuss is the license agreements itself. In signing this agreement, we as business people give up an enormous amount of our personal privacy and rights. We are forced to give these associations access to our records at a level that almost compares to the Internal Revenue Service.

The contract itself is very one-sided. It offers a lot of protection to the copyright association, but gives us little room to redress grievances. There is even a clause in the license agreement that says if I do anything to interfere with their ability to do business in the State or region that they can revoke my license. I am very concerned and I wonder how they will construe my appearance here today.

Ultimately, they seem to have the ability to pull my license, and, in fact, I have had several representatives on several occasions to tell me that I should consider it a privilege to have a license, not a right.

If I were to try to have music without a license, they could fine me to the point of putting me out of business, and this would be legal.

What I find most upsetting, Mr. Chairman, is that as a small business I have no recourse. How, in America, does an organization designed to benefit musicians have a right to pull the plug on a small businesses?

I appreciate this opportunity to testify before you hear today, Mr. Chairman. I am a small businessman who is being dealt with unfairly and without recourse. I hope your hearing today and the others yet to come will shed some more light on this situation, and ultimately lead to a solution.

Thank you again for allowing me to testify.

[The prepared statement of Mr. Deion follows:]

PREPARED STATEMENT OF JOHN DEION, OWNER, LAST CALL SALOON, PROVIDENCE, RI, ON BEHALF OF THE NATIONAL RESTAURANT ASSOCIATION

My name is John Deion. About 12 years ago, I left a good job at John Hancock insurance when my wife and I decided to renovate an old boiler room in a commercial building in Providence, Rhode Island, and turn it into a rhythm and blues club that we named the Last Call Saloon.

I agree totally with what Mr. Gregg has said here today. I support HR 3288 and would also like to see all incidental music included.

I agree with the basic premise of music copyright laws and I agree that some fees should be paid. And, like Mr. Gregg, I also would like to see the legislation go even further toward addressing the virtually unchecked powers of the music licensing organizations. Specifically, I think this market needs an impartial third-party mechanism, other than the courts, to deal with concerns and conflicts that may arise between establishments such as mine and ASCAP and BMI.

There is a wide perception in our industry that the enforcement of the copyright laws is extremely arbitrary and inequitable. As a person who has paid fees for over 12 years, I don't know if every person who uses music in the state of Rhode Island is paying that same fee. I have asked, but never found out.

As it stands, the law from my perspective appears extremely one-sided in favor of the music licensing organizations. Any legal action on our part would be prohibitively expensive. The music licensing organizations know this and treat us small business owners with a great degree of impunity.

This environment has made small business easy targets for these large uncontrolled organizations.

The music licensing organizations can charge virtually at will, without having to account for their activities to any governmental agency anywhere. Certainly they are not guided by the same forces of the economy and competition that we are.

You may be aware that Rhode Island has endured particularly unpleasant economic conditions over the past two years, which were made worse by the crash of our state's credit union a little more than two years ago.

In that time my business has had to cut back. If anything the economic benefit we get from music has diminished, not increased. My patronage is down -- I've only

sold out maybe a dozen times in the last two years. Revenue is down. We've taken personal cuts in pay. I've even taken to doing things like laying off the janitorial service and doing it myself -- to save money.

But the breaking point for me was that in the middle of a significant downturn in my business -- and I think in the business of everyone else -- BMI and ASCAP wanted rate increases.

ASCAP wanted 20 percent.

In this economy, if I raised my prices by 20 percent, I would put myself out of business. The margins in this business wouldn't tolerate it. People would stop coming to my club.

But I'm not a monopoly. I was faced with either paying the fee or going to court. And as I've said, court is not an option. Over the years my attorneys have said pay the money and keep quiet. So that's what I did.

The other part of this issue that I would like to discuss is the license agreement itself. In signing this agreement, we as business people give up an enormous amount of our personal privacy and rights. We are forced to give these companies access to our records at a level that almost compares to the Internal Revenue Service.

The contract itself is very one-sided. It offers a lot of protection to the copyright association but gives us little room to redress grievances.

There is even a clause in the license agreement that says that if I do anything that interferes with their ability to do business in the state or region, they can revoke my license. I wonder how they'll construe my appearance today.

Ultimately, they seem to have the ability to pull my music license. And, in fact, I have had representatives on several occasions tell me I should consider it a privilege to have a license, not a right.

If I were to try to have music without a license, they could fine me to the point of being put out of business -- legally.

What I find most upsetting, Mr. Chairman, is that as a small business I have no recourse. How in America can an organization designed to benefit musicians have a right to pull the plug on a small business?

I appreciate this opportunity to testify before you today, Mr. Chairman. I'm a small businessman who's being dealt with unfairly and without recourse. I hope your hearing today and others yet to come will shed some more light on this situation and ultimately lead to a solution.

P 530 701 534

ASCAP
TEN SPEEN ST
FRAMINGHAM, MA 01701

November 25, 1991

LAST CALL SALOON
DEION BROTHERS, INC.
15 ELBOW ST
PROVIDENCE, RI 02903

Dear Licensee:

For nearly ten years ASCAP's fees for establishments like yours have changed only to keep pace with inflation, while our expenses have increased at a greater rate due in large part to the costs of billing and collection of delinquent accounts.

Over these years, many new songwriters and music publishers joined ASCAP. These members, and those members of 40 affiliated foreign societies, have enlarged and enriched our repertory substantially. Today, there are many more compositions available for performance under an ASCAP license agreement than ever before. An ASCAP license agreement is the easiest and least expensive way for users of music to obtain permission to perform any of the songs in the vast ASCAP repertory.

For these reasons, we find it is both necessary and fair that ASCAP's license fees be increased. The changes in our Rate Schedule generally amount to 20%; however, you can save 20% in license fees by paying your annual fee by January 31 of that year.

Enclosed is the new license agreement for your establishment. It will replace the current agreement, which we are now terminating effective January 1, 1992 pursuant to subparagraph "1(c)" which reads:

> "Either party may, on or before thirty days prior to the end of the initial term or any renewal term, give notice of termination to the other. If such notice is given the agreement shall terminate on the last day of such initial or renewal term."

You may continue to pay your current lower fees for six months.

To obtain this benefit, you must sign and return the new license agreement by January 31, 1992, together with payment of $1,278.50 which represents $815.00 in license fees due through the date of termination of your current agreement and $463.50 to cover license fees for the period through July 1, 1992.

To save money and continue to have the benefit of an ASCAP license you must act promptly. Please sign and return both copies of the enclosed agreement with your payment of $1,278.50. We have included a pre-addressed envelope for your convenience. Upon our receipt of your signed license agreements and appropriate payment, we shall return a fully executed copy of the agreement to you.

When your new license fees go into effect, they will be based on your operating music policy. Our records indicate that the enclosed Statement of Licensee's Operating Policy represents your current uses. If it is incorrect or incomplete, please make the appropriate changes and return it to us.

Finally, we are enclosing a Questions and Answers pamphlet which contains important information about ASCAP and your rights. Please read it, and if you have any questions, please call or write.

Cordially,

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

William R. Lee

William R. Lee

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

03420005591 1435

ascap
American Society of Composers, Authors & Publishers

John A. Bonaccorso
DISTRICT SALES MANAGER

May 8, 1992

Mr. John Deion
Last Call Saloon
15 Elbow Street
Providence, RI 02903

Dear Mr. Deion:

Thank you for your letter of May 1, 1992. Let me begin by informing you that your letter of December 5th, 1991 was never received.

With regard to your current balance, I have applied your check in the amount of $200.00 to your account. Our records indicate that license fees are now due to the date that your license agreement was terminated in the amount of $265.00.

In reviewing your account, we note that a balance was due through December 31, 1990 in the amount of $214.00. License fee charges in the amount of $901.00 were posted to your account for the period January 1, 1991 through December 31, 1991. We received $100.00 in March, $200.00 in June and seven $50.00 payments during the period December 1991 through April. We have now received your $200.00 payment leaving a balance of $265.00.

As Mr. Lee's letter dated November 25th, 1991 explained, our expenses due to in large part to costs of billing and collection of delinquent accounts have increased dramatically. For Mr. Petrone to visit your establishment on a weekly basis would force undo costs on the Society.

We are well aware of the hardships placed on the nightclub and bar industry recently. However, music is an important part of your business and the copyright law is clear that permission must be gained prior to the performance of our members' works.

In reviewing your file, Deion Brothers, Inc. has held our license agreement for almost ten years. In fact, a young representative by the name of John Bonaccorso had collected the original document from a new nightclub operator in Providence named John Deion. You have always recognized the importance of copyright as it relates to the songwriter.

111 Speen Street, Framingham, MA 01701 Area Code (508) 875-3515 Fax Number (508) 872-2129

It is not our intention to put you out of business. Our purpose is to offer you a license agreement which is the easist and most economical path to obtain permission to perform the 40,000 songwriters works that make up the vast repertory of ASCAP.

Due to the fact that we did not receive your letter of December 5th, I shall be willing to extend the offer made by Mr. Lee in his letter dated November 27th. We will freeze your license fee for the first six months of 1992 provided that you remit payment as per the attached invoice on or before May 15, 1992. Upon receipt of your check, we will return an executed copy of the agreement to you for your files.

If this is not acceptable, we look forward to receiving your check for at least $265.00 in order that we may execute the agreement that we have received and reinstate your account at the applicable license fee. Thereafter the account will be billed on a trimesterly basis.

Lastly, with regard to SESAC, please be advised that the organization is a legitimate performing rights organization. If you are performing the works found in SESAC's repertory, you should obtain their license or permission directly from their affiliates.

If you wish to discuss this matter, please contact me. Otherwise, I look forward to what I hope will be a favorable response.

Sincerely,

John A. Bonaccorso
New England District Manager

JAB/jp

ascap
American Society of Composers, Authors & Publishers

John A. Bonaccorso
DISTRICT SALES MANAGER

June 25, 1992

Mr. John Deion
Last Call Saloon
15 Elbow Street
Providence, RI 02903

Dear Mr. Deion:

Thank you for your letter of June 8, 1992 along with your signed license agreement and payment in the amount of $150.00. We are unable to reinstate your agreement until all past-due balances under your former agreement are paid in full. Our records indicate license fees are due through the date your agreement was terminated in the amount of $115.00.

Furthermore, license fees are currently due for the first two trimesters of the current agreement in the amount of $741.00.

I believe ASCAP has extended every possible consideration with regard to the collection of your license fees. Our agreement does not call for representatives to visit your establishment on a regular basis to collect license fees. I am certain that you do not ask the electric company, telephone company or other venders to routinely visit your business to collect payments. ASCAP is simply asking to be treated like any other supplier with which you do business.

We shall be more than willing to work with you with regard to a payment schedule for the remainder of 1992. Total license fees will be due through December 31, 1992 in the amount of $1227.00 . This figure represents the $115.00 due through the date that your former agreement was terminated. May I suggest that you remit payment in the amount of $227.00 on July 1st to be followed by $200.00 monthly payments on August 1st, September 1st, October 1st, November 1st and December 1st of this year. Of course, applicable finance charges would be assessed.

In hopes that this is agreeable, I have enclosed several postage-paid envelopes to facilitate your remittance.

Per your request, I am also enclosing a List of Composers, Authors and Publishers represented by ASCAP. Finally, please be advised that ASCAP routinely returns 80% of it revenues to its members. The remainder is attributed to operating costs.

111 Speen Street, Framingham, MA 01701 Area Code (508) 875-3515 Fax Number (508) 872-2129

June 25, 1992
Last Call Saloon

Mr. Deion, I truly hope that we will be able to resolve this matter. Upon receipt of your first payment, I will return an executed copy of the agreement for your files.

Sincerely,

John A. Bonaccorso
New England District Manager

JAB/jp

Enclosures

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
ARTICLE # 831202

CC: Ordinary Mail

Mr. EDWARDS. Before I ask the next witness to testify, how much do you pay per year approximately?

Mr. DEION. Approximately $2,000, Mr. Chairman, to the three organizations.

Mr. EDWARDS. Do people dance to that music?

Mr. DEION. Yes. I charge an admission. Unlike some of the testimony here, I do have live entertainment, and I feel that I should pay a fee for the use of that live entertainment.

Mr. EDWARDS. But do people dance to the recorded music?

Mr. DEION. Yes, they do. It is mostly live entertainment. We have a jukebox, but that is separately licensed through the vendor that owns the jukebox.

Mr. EDWARDS. Do you have a different view if they dance to this music that is copyrighted?

Mr. DEION. Yes. As I said earlier in my testimony, I agree that some fees should be paid. I am totally—I support the basic, philosophical premise that the music is the property of the musicians, the composers, and the writers, and I would be the first to admit that I do derive some economic benefit from the use of that music.

I have many musicians that then, in turn, collect money who are not licensed. I have many times asked my representatives why can't we come to some situation where I am licensed, for a reduce fee, and my artists are also licensed so that they, in essence, are the ones that select the songs. I have no control over the musical selections that a band or a group may play while they are on my stage in my establishment.

Many times the representatives have said that because I am there, I am the fixed object, I am the one that is obligated to pay the license fee, and they express no concern in terms of collecting the fees from the musicians themselves.

Mr. EDWARDS. Who pays the license fee for the live entertainment that you might employ?

Mr. DEION. I do.

Mr. EDWARDS. And how is that figure arrived at?

Mr. DEION. I am not quite sure, Mr. Chairman. I receive——

Mr. EDWARDS. That's in addition to the $2,000 or is that included?

Mr. DEION. No, no. In other words, between the three licensing music associations, my approximate annual fee is about $2,000, which I may add is in excess of my workman's comp premium and in excess of my liquor license renewal fee.

Mr. EDWARDS. You pay in one check to all three?

Mr. DEION. I pay over the year to each of the three organizations.

Mr. EDWARDS. Separate checks?

Mr. DEION. Separate checks, yes. And they all seem to come up with a different way of determining what my economic benefit is, and, hence, what the license fee should be for my establishment.

Mr. EDWARDS. Counsel advises me that they don't talk together about how much they're going to charge. Is that also correct?

Mr. DEION. I am not sure of that.

Mr. EDWARDS. Apparently, some of the people here aren't sure either.

Mr. DEION. With all due respect, Mr. Chairman, I have learned a lot about these organizations over my 12 years of business, but

I would not profess to know everything that might be helpful in my situation, and I think that is one of the problems. I am not certain that there is enough information provided to us as a small business to deal efficiently or accurately with these organization.

Mr. EDWARDS. That is very helpful. Thank you.

We are now going to hear from Mr. Guy Gregg on behalf of the National Restaurant Association.

Welcome, Mr. Gregg.

STATEMENT OF GUY GREGG, THE PUBLICK HOUSE RESTAURANT, CHESTER, NJ, ON BEHALF OF THE NATIONAL RESTAURANT ASSOCIATION

Mr. GREGG. Thank you, Mr. Chairman and members of the subcommittee. My name is Guy Gregg. I own the Publick House Restaurant, a moderately priced tablecloth restaurant in Chester, NJ. I am a former president of the New Jersey Restaurant Association, an organization whose members have been extremely vocal over their concerns with music copyright fees and practices.

I am here today representing both my views and also those of the National Restaurant Association. Before I begin, I want to stress that the restaurant industry does not object to the fair payment to musicians for their original works.

Our interest is in expanding the current homestyle exemption to permit establishments to have multiple televisions or radios and pay no licensing fees. We would also like to see the law expanded to exempt all incidental music in restaurants. This would help eliminate the badgering of our restaurants by agents of the music licensing organizations.

As a businessman whose restaurant utilizes both background and music live performances, I am faced with copyright fees for both groups, and I pay ASCAP and BMI for both, but I believe the system is well overdue for reform.

In the statement prepared by ASCAP, Mr. Gould says that we, as restaurants, should not demand free use of music in our establishments. Mr. Chairman, the music that we play on radios and television in our restaurants have already been paid for by the radio and television stations that broadcast that. I cannot charge my customers twice for the same meal. How can they charge twice or even more for a rebroadcast of music.

I feel strongly that the legislation we are discussing today represents a fair and positive step toward updating music copyright law. We support H.R. 3288 which would eliminate the copyright liability on incidental music played on both televisions and radios in restaurants.

The absurdity of having to pay for music from a commercial which may be licensed while watching a Redskins football game at a restaurant speaks for itself. We applaud Congressmen Thomas and Pastor for their efforts in introducing this legislation. We hope to build upon it.

Reform, we believe, should expand upon the concept of incidental music in a restaurant or tavern, or for that matter, a dentist office or answering machine. We recommend that all incidental music, whether it be from a CD, a record, tape, radio, television, be exempted from licensing fees.

The presence of background music in a restaurant or tavern is really no different than a cabdriver playing a radio. The music is genuinely incidental, not in any way used to attract customers. How many of you, for example, choose your dentist because of the music they play in their office.

As for restaurants, someone decides to patronize the restaurant because of good food, good service, nice atmosphere, or convenient location. No one picks a restaurant on the quality of its background music. Therefore, the presence of that music should be considered incidental and warrant no fee.

It is a different matter if an operator advertises this music to attract customers. That would fall under the definition of using music for direct profit, and should be handled differently. Similarly, I believe that compensating for live performances to be the responsibility of the performing artists.

If I hire a guitarist on a Saturday night, that person should be licensed with ASCAP or BMI to perform their music. That, too, it seems to me would be an appropriate and equitable way to fund the system. That way, if a musician chooses to pay exclusively ASCAP or a BMI list, they can choose which one they wish to play from, and they would then not have to pay for a license for both.

Even as the law stands right now, I do not have the option of paying either one group or the other because I can't get a copy of the song list from either group, and I don't know of a single restaurateur who has been able to do this.

We are charged for playing certain songs, but we are unable to find out which songs are licensed by each group. If we are required to pay these organizations, we ought to have access to the list of songs each represents, and chose which organizations we wish to deal with.

This all illustrates the very capricious and arbitrary nature within which the music licensing organizations work. I prefer to use music in the operation of my restaurant. To have music, I need to pay licensing fees to ASCAP and BMI. There is no other way around it. There is no competition for this service; it has all the negative attributes of a monopoly.

Let me give you a personal example. For the past 11 years I have paid ASCAP and BMI. I just considered it a customary cost of doing business, just like paying my utility bill. When I first started in business 11 years ago, I paid about $200. Over the years that amount has increased to about $1,000. They always sent a bill; I always sent a check.

Last year I received a statement from BMI that summarized my payments going back to 1986 for every year through 1993. It confirmed my payments and showed a zero balance for the years. I have included all of this information in my written submission.

At the same time BMI kept requesting new information about my operation including financial statements. They threatened if I did not provide this information they would sue me. On the advice of our attorneys who assured me this pressure was illegal, I did not respond.

In another letter BMI said because I did not provide their requested information they could pretty much charge me whatever they wanted. With that, I received a new statement that actually

altered my old bill. Where once I had a zero balance, I now owed them money.

Mr. Chairman, I cannot believe that Congress would pass a law that would allow things like this to happen. There is, to the best of my knowledge, no Federal agency, no congressional oversight monitoring these organizations, and there is no sort of third-party mechanism in place that would put businesses like mine on an equal footing with these licensing organizations.

Even paying the fees is riddled with inconsistencies. The fee structure is rarely adhered to by the representatives of ASCAP and BMI. We know of deals cut for reduced fees for chains, and in New Jersey our association undertook a survey which showed wide fluctuation from nationally set rates.

This is a subtle form of legal extortion, and it really does happen. You cannot fight them because it costs you far too much in legal fees than to just pay their invoice.

A fellow New Jersey restaurateur, Frank Panico, who is right behind me, traveled with me here today. He is one of the few restaurateurs who chose to fight. Panico's is an upscale Italian restaurant with piped in music and a Saturday night piano player.

Frank decided not to be bullied and refused to sign. ASCAP deployed one of its agent to surreptitiously visit Panico's and uncover the fact that Frank's piano player was performing music for which he had no license. They discovered four such songs, and sued Frank for $100,000 plus legal fees.

Frank ended up settling for approximately $5,200 plus $2,800 in legal fees. This, for a fee that would have been $400 a year. To fight them further, he was told by his attorneys, would cost between $50,000 and $75,000.

If the piano player had been individually licensed, and if the incidental music had been exempted from licensing, Frank never would have had to expend that tremendous amount of money and time fighting this organization.

There is no legal recourse for us, Mr. Chairman. The system was developed to protect the rights of musicians, not to foster the subservience of restaurateurs. Unfortunately, that is exactly what the system has done. It has created a $100 million plus bully in the form of music licensing organizations who have their collective hands around the throats of restaurateurs.

Mr. Chairman, we support H.R. 3288, and we would like to see it expanded. If a restaurant does use incidental music, it should not have to pay a licensing fee. Restaurants represent an easy target for these organizations. You can eliminate the tremendous problems we are facing by exempting incidental music from these licensing fees.

Mr. Chairman, I would be concluding on that except I do have one further comment. I have listened today to testimony from both ASCAP and BMI and SESAC, and I have heard from the committee that they would wish us to try to get together.

BMI was very accurate in saying that the New Jersey Restaurant Association and BMI have been speaking and attempting to come to a compromise. However, all of our efforts to have a meeting with ASCAP have been clearly not accepted.

Thank you, Mr. Chairman, and I will be happy to answer any questions.

[The prepared statement of Mr. Gregg follows:]

TESTIMONY OF GUY GREGG
OWNER, THE PUBLICK HOUSE RESTAURANT
CHESTER, NEW JERSEY
BEFORE THE SUBCOMMITTEE ON INTELLECTUAL
PROPERTY AND JUDICIAL ADMINISTRATION
HOUSE JUDICIARY COMMITTEE
FEBRUARY 23, 1994

My name is Guy Gregg. I own the Publick House Restaurant, a moderately priced tablecloth restaurant in Chester, New Jersey. I am a former president of the New Jersey Restaurant Association, an organization whose members have been extremely vocal over their concerns with the music copyright fees and practices. I am here today representing both my own views and also those of the National Restaurant Association.

Before I begin, I want to stress that the restaurant industry does not object to the fair payment to musicians for their original works. Our interest is in expanding the current homestyle exemption to permit establishments to have multiple televisions or radios and pay no licensing fees. We would also like to see the law expanded to exempt all incidental music played in restaurants. This would help to eliminate the badgering of our restaurateurs by agents of the music licensing organizations.

As a businessman whose restaurant utilizes both background music and live music performance, I am faced with copyright fees for both. And I pay ASCAP and BMI for both. But I believe the system is well overdue for reform.

I feel strongly that the legislation we're discussing today represents a fair and positive step toward updating music copyright law. We support HR 3288, which would eliminate the copyright liability on incidental music played on both televisions and radios in restaurants. The absurdity of having to pay for music from a commercial which may be licensed, while watching a Redskins football game at a restaurant speaks for itself. We applaud Congressmen Thomas and Pastor for their efforts in introducing this legislation. And we hope to build upon it. Reform, we believe, should expand on the concept of incidental music in a restaurant or tavern -- or, for that matter, a dentist's office or an answering machine. We recommend that all incidental music, whether it be from a CD, record, tape, radio, or television, be exempted from licensing fees.

The presence of background music in a restaurant or tavern is really no different than a cab driver playing the radio. The music is genuinely incidental, not in any way used to attract customers. How many of you, for example, choose your dentist because of the music they play in their office? As for restaurants, someone decides to patronize a restaurant because of good food, good service, a nice atmosphere or a convenient location. Nobody picks a restaurant on the quality of its background music. Therefore, the presence of that music should be considered incidental and warrant no fee.

It is a different matter if an operator advertises this music to attract customers. That would fall under the definition of using music for direct profit and should be handled differently.

Similarly, I believe that compensation for live performances should be the responsibility of the performing artists. If I hire a guitarist for a Saturday night, that person should be licensed with ASCAP or BMI to perform their music. That too, it seems to me, would be an appropriate and equitable way to fund that system.

That way, if a musician chooses to play exclusively from the ASCAP list or the BMI list, that can be his or her choice. And they would not have to obtain a license from both. This would alleviate the need for restaurateurs to be licensed and would lift the burden of dealing with the music licensing agents.

Even as the law stands right now, I do not have the option of paying either one group or the other because I can't get a copy of the song lists from either group. And I don't know of a single restaurateur who has been able to do this. We're charged for playing certain songs, but we're unable to find out which songs are licensed by each group. If we are required to pay these organizations, we ought to have the access to the list of songs each represents, and choose which organization we want to deal with.

This all illustrates the very capricious and arbitrary nature within which the music licensing organizations work.

I prefer to use music in the operation of my restaurant. To have music, I need to pay licensing fees to ASCAP and BMI. There is no other way around it. There is no competition for this service and therefore it has all the negative attributes of a monopoly.

Let me give you a personal example. I, to my knowledge, have never signed a contract with BMI or ASCAP, but I always pay them. I've always considered it a customary cost of doing business, just like paying my utility bill.

When I first started in business eleven years ago, I paid about $200. Over the years that amount has increased to about $800. They always sent a bill, I always sent a check.

Last year, I received a statement from BMI that summarized my payments, going back to 1986. For every year, through 1993, it confirmed my payments and showed a zero balance for the year. I have included all this information in my written submission.

At the same time, BMI kept requesting new information about my operation, including my financial statements. They threatened that if I didn't provide this information they would sue me.

On the advice of our attorneys, who assured me that this pressure was illegal, I did not respond.

In another letter, BMI said that because I did not provide the requested information, they could pretty much charge me whatever they wanted. And with that, I received a new statement that actually altered the old bill. Where I once had a zero balance, I now owed them money.

Mr. Chairman, I can't believe that Congress would pass a law that would allow things like this to happen. There is, to the best of my knowledge, no federal agency or Congressional oversight group monitoring these organizations. And there is no sort of third party mechanism in place that would put businesses, like mine, on an equal footing with these music licensing organizations.

This is the abusive environment in which we have to work. And it is like this nationwide. If you don't comply they threaten a lawsuit. They'll send in representatives who will "catch" you playing music for which you are not licensed and then sue you for up to $20,000 per song and up to $100,000 if the violation is willful, plus legal fees.

Even paying the fees is riddled with inconsistencies. The fees structure is rarely adhered to by the representatives of ASCAP and BMI. We know of "deals" cut for reduced fees for chains, and in New Jersey, our association undertook a survey which showed wide fluctuation from the nationally set rates.

This is a subtle form of legal extortion. And it really does happen. You can't fight them because it costs far more in legal fees than to just pay their invoice.

A fellow New Jersey restaurateur named John Panico, who traveled here with me today, is one of the few restaurateurs who chose to fight. Panico's is an upscale Italian restaurant that uses piped in music and a Saturday night piano player. John decided not to be bullied and refused to sign. ASCAP deployed one of its agents to surreptitiously visit Panico's and uncover the fact that Frank's piano player was performing music for which he had no license. They discovered four such songs and sued Frank for $100,000, plus legal fees.

Frank ended up settling for approximately $5200, plus $2800 in legal fees. This, for a fee that would have been $400 a year. To fight them further, he was told by his attorneys, would cost between $50-$75,000. If the piano player had been individually licensed and if incidental music had been exempted from licensing, Frank never would have had to expend the tremendous amount of money and time fighting this organization.

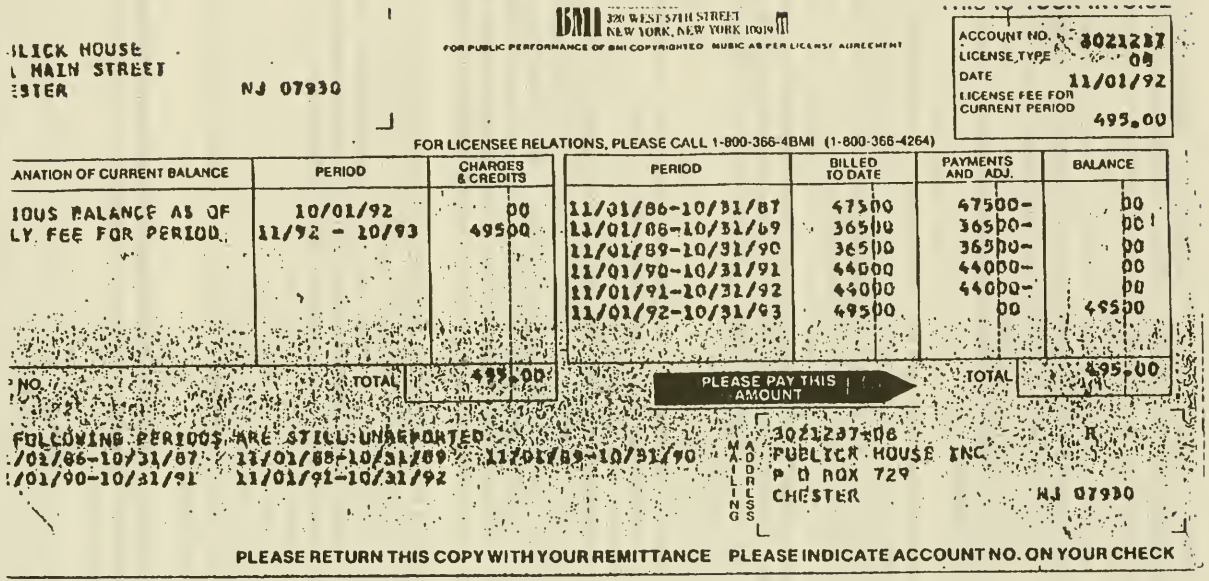
There is no legal recourse for us, Mr. Chairman.

This system was developed to protect the rights of the musicians, not to foster the subservience of restaurateurs.

Unfortunately, that's exactly what this system has done. It has created a $100 million plus bully in the form of music licensing organizations, who have their collective hands around the throats of restaurateurs.

Mr. Chairman, we support HR 3288, and we would like to see it expanded. If a restaurant does use incidental music, it should not have to pay licensing fees. Restaurants represent an easy target for these organizations. You can eliminate the tremendous problems we face by exempting incidental music from these licensing fees.

Thank you, Mr. Chairman, and I'll be happy to answer any questions.



BMI 320 WEST 57TH STREET NEW YORK, NEW YORK 10019

FOR PUBLIC PERFORMANCE OF BMI COPYRIGHTED MUSIC AS PER LICENSE AGREEMENT

ACCOUNT NO. 3021237
LICENSE TYPE 08
DATE 11/01/92
LICENSE FEE FOR CURRENT PERIOD 495.00

LICK HOUSE
MAIN STREET
STER NJ 07930

FOR LICENSEE RELATIONS, PLEASE CALL 1-800-366-4BMI (1-800-366-4264)

ANATION OF CURRENT BALANCE	PERIOD	CHARGES & CREDITS
IOUS BALANCE AS OF	10/01/92	00
LY FEE FOR PERIOD	11/92 - 10/93	49500
NO.	TOTAL	495.00

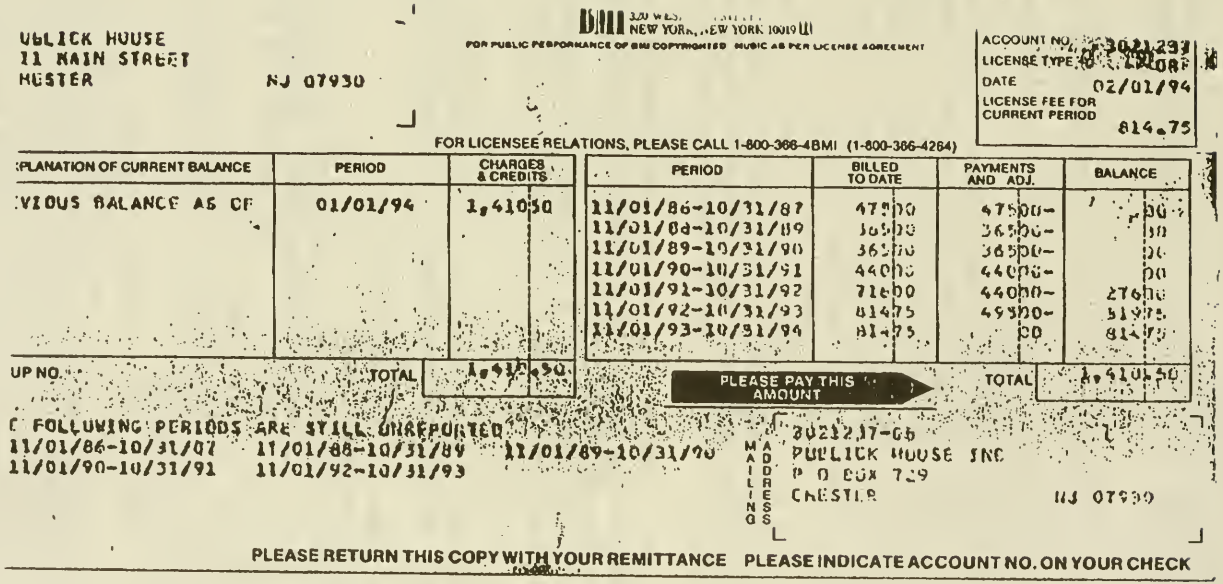
PERIOD	BILLED TO DATE	PAYMENTS AND ADJ.	BALANCE
11/01/86-10/31/87	47500	47500-	00
11/01/88-10/31/89	36500	36500-	00
11/01/89-10/31/90	36500	36500-	00
11/01/90-10/31/91	44000	44000-	00
11/01/91-10/31/92	44000	44000-	00
11/01/92-10/31/93	49500	00	49500
TOTAL			495.00

PLEASE PAY THIS AMOUNT

FOLLOWING PERIODS ARE STILL UNREPORTED
/01/86-10/31/87 11/01/88-10/31/89 11/01/89-10/31/90
/01/90-10/31/91 11/01/91-10/31/92

MAILING ADDRESS
3021237*08 R
PUBLICK HOUSE INC.
P O BOX 729
CHESTER NJ 07930

PLEASE RETURN THIS COPY WITH YOUR REMITTANCE PLEASE INDICATE ACCOUNT NO. ON YOUR CHECK



BMI 320 W... NEW YORK, NEW YORK 10019 (1)
FOR PUBLIC PERFORMANCE OF BMI COPYRIGHTED MUSIC AS PER LICENSE AGREEMENT

UBLICK HOUSE
11 MAIN STREET
HUSTER NJ 07930

ACCOUNT NO. 8021237
LICENSE TYPE [illegible]
DATE 02/01/94
LICENSE FEE FOR CURRENT PERIOD 814.75

FOR LICENSEE RELATIONS, PLEASE CALL 1-800-366-4BMI (1-800-366-4264)

EXPLANATION OF CURRENT BALANCE	PERIOD	CHARGES & CREDITS
VIOUS BALANCE AS OF	01/01/94	1,410.50
UP NO.	TOTAL	1,410.50

PERIOD	BILLED TO DATE	PAYMENTS AND ADJ.	BALANCE
11/01/86-10/31/87	47500	47500-	00
11/01/88-10/31/89	36500	36500-	00
11/01/89-10/31/90	36500	36500-	00
11/01/90-10/31/91	44000	44000-	00
11/01/91-10/31/92	71600	44000-	27600
11/01/92-10/31/93	81475	49300-	32175
11/01/93-10/31/94	81475	00	81475
TOTAL			1,410.50

PLEASE PAY THIS AMOUNT

THE FOLLOWING PERIODS ARE STILL UNREPORTED
11/01/86-10/31/87 11/01/88-10/31/89 11/01/89-10/31/90
11/01/90-10/31/91 11/01/92-10/31/93

MAILING ADDRESS
8021237-06
PUBLICK HOUSE INC
P O BOX 729
CHESTER NJ 07930

PLEASE RETURN THIS COPY WITH YOUR REMITTANCE PLEASE INDICATE ACCOUNT NO. ON YOUR CHECK

Mr. EDWARDS. You tried to get a meeting with ASCAP, and you couldn't even get a meeting?

Mr. GREGG. They have refused, and it is a point of record. Our attorneys have contacted them, and we can get that documentation to you if you wish.

I appreciate your time. Thank you, sir.

Mr. EDWARDS. Well, thank you. We appreciate your testimony, Mr. Gregg.

Mr. Johnson, did you say that the size of the TV set has something to do with the fee charged?

Mr. JOHNSON. Yes. Under the current scheme, ASCAP has determined, I believe that a television set with a screen in excess of 36 inches on up is a licensable piece of equipment, and I believe that BMI has determined that anything in excess of a 25-inch screen, which would be the 26 and 27 on up, is licensable. What they are refusing to do is recognize the fact that those pieces of equipment are really homestyle pieces of equipments.

I do not have to go to a manufacturer and have a piece of equipment especially designed for my usage. I can go into any retail outlet and buy a 27-inch or 35-inch television. It is clearly marketed for home use, and they have taken the position that these are not homestyle.

What they would like to do, I believe, is litigate this point and have it become law by default as a result of someone litigating it and losing the case. It hasn't happened yet.

Mr. EDWARDS. Certainly, this is restricted to commercial establishments. This doesn't apply no matter how big a set you have at home?

Mr. JOHNSON. That's correct, yes. In other words, the homestyle exemption is an application to commercial establishments that are employing the use of equipment that is commonly used in the home.

Mr. LEONARD. Mr. Chairman, if I might?

Mr. EDWARDS. Yes, sir.

Mr. LEONARD. I did not have to bring televisions with me. I couldn't fit them in the car. This here sized television screen, I have to pay for. This one is exempt. That's with ASCAP. Now, with BMI, that's the size we are allowed to have.

Mr. EDWARDS. If they got together, it would be almost a per se violation of the antitrust law, wouldn't it, if they agreed that they should all use the same size?

Mr. LEONARD. Well, I think the home exemption would be clear. If I bought it in a store such as Wal-Mart, K-Mart, Sears or Penney's, where anyone can buy a television right off the shelf for their home, and today a 27-inch or a 36-inch can be picked up at the loading dock and put in the trunk of your car.

Mr. EDWARDS. Do any of you know, insofar as this copyright law is a Federal law subject to oversight by Congress and Congress has an investigative organization that gives its opinions and audits, if this issue has ever been reviewed by the General Accounting Office?

Mr. JOHNSON. Not to my knowledge, sir.

Mr. EDWARDS. No?

Mr. JOHNSON. No. It is clearly, as you indicate, a case of an existing monopoly, and a monopoly, as we have alluded too, certainly deserves oversight. As we are telling you here, they are making the rules, and they've got the only game in town. So you either pay or you cannot play. That, basically, is the rule.

While I really endorse the concept of negotiating, certainly when you negotiate you would like to be in the position where you have something that is negotiable. While we are talking about negotiations, everyone knows that negotiation means that two sides give and take, and when your side has nothing to give except money, then what are the grounds for negotiation? I mean, how can you really have meaningful negotiations under the circumstances.

That kind of a situation certainly cries out for some kind of third-party intervention. Somebody with the authority to at least ensure that there is fairness in negotiations, and I believe that is why we are here, sir. I think that we feel that the Congress is the solution to that problem.

Mr. EDWARDS. Mr. Gregg.

Mr. GREGG. I think it is important to understand that every day the technology is improving in this country, and we are looking at laws that at this point are 16 years old, and in another 5 years they will be 21 years old.

The kind of reform we are looking for is something that is equitable to everybody. The concept of having the composers not get money is not effective. They are definitely due income.

How that is collected, I think, is what should be reviewed at this period of time, and the method of collection of sending people out to sign contracts in the 1990's may not be as effective as it was in the 1940's.

We should use some of the technology that we have today which may mean putting fees attached inside of the CD's, the blank cassettes, other ways of ensuring that these composers get 100 percent compliance on getting the money that they are due, and allowing people who are just providing incidental music, music that does not necessarily draw people immediately into your establishment, giving those folks the capacity to pay for that in the CD as is done customarily right now.

Mr. EDWARDS. Thank you. Well, I know Mr. Hughes and the members of the subcommittee and the staff here pretty well. I am sure they are going to take a very hard look at this whole issue.

Since I did not have the privilege of hearing the testimony of the first panel, I wonder if the majority staff lawyer would be interested in asking a question.

Mr. PATRY. ASCAP and, of course, BMI are subject to consent decrees. ASCAP testified that in a case where someone does not agree with a quoted rate, that you are entitled to go to the Southern District of New York and have that rate fixed.

Mr. Hughes, I believe asked questions about whether that was an effective mechanism, and there was testimony that in the case of at least one chain of restaurants that they had gone to the rate court.

Have you entertained the possibility of doing that?

Mr. GREGG. We have one restaurant operator, a member of the New Jersey Restaurant Association, who has attempted to work

through the southern district court, the rate court, and at this point has achieved no answer and no response. So the process has started, but as Mr. Hughes stated, at this point after months and months he has gotten no response. So it is a time-consuming process, and at this point we have no one who has succeeded in the State of New Jersey.

Mr. DEION. If I may add. In the State of Rhode Island, many of us have tried to, first of all, obtain a list of the licensed establishments throughout the State of Rhode Island so that we then could use that list to work together and try and determine a way of dealing with the license fees and perhaps approaching this on a group effort.

We are not able, either as an association in the State of Rhode Island, the Rhode Island Hospitality Association, or as individual owners of our establishments, to determine who actually is licensed and who is not. Therefore, we have no ability of pooling that information.

We obviously can solicit internal members of our own association, but that does not encompass everybody that may or may not have a music license in the State of Rhode Island, therefore making it very difficult for us to deal with this issue by operating as a group, going to the State of New York.

I would also like to add the recourse offered to me as an individual business owner to address the southern district court in the State of New York is, for all realistic purposes, an impossibility. I do not have the wherewithal, I do not have the resources or the legal ability to try and address those issues. And as expedient as they might be, the cost would be prohibitive for the size of my business to deal with those in the State of New York.

Mr. GREGG. Just one addition. I think it is important for the record that we remember that only ASCAP has that method in the southern district court, so only one-third of the licensing groups have any resource. The other two groups at this point it is, pay me or don't.

Mr. PATRY. Mr. Berman asked the question if your use of music is truly incidental, and if the costs and headaches associated with it are substantial, then why use it at all? Why not just turn off the TV's or the radio sets? Do you have any answer to his question?

Mr. LEONARD. A lot of times we do turn off the sound on the television.

Mr. PATRY. I mean, not just turn it down temporarily. Take them out and not use them.

Mr. LEONARD. Well, I do not think we are licensed to—is there a license for the viewing or just the music?

Mr. PATRY. The question is, if the use is incidental, it is not really important to what you are doing, and since it is such a difficult and costly endeavor to engage in licensing them, why don't you just not have television sets or radio sets in your establishments? I think that was the thrust of the question.

Mr. GREGG. I think that is a valid question. I think what will occur is exactly what you wish. It is a self-fulfilling prophesy that if it does become more and more cumbersome that you find less restaurants utilizing it.

But I think restaurants and taverns look at music the way I look at it. It is part of my restaurant. It is another painting on the wall. It is part of the ambiance. It is part of what occurs. I will challenge any of you up there to name me the last song you remember the last time you went out to eat.

Mr. PATRY. Of course, the performing rights societies' response to that is that you pay for the painting, you pay for the other parts of the ambiance, why shouldn't you pay for this part as well?

Mr. GREGG. And we paid for the cassette. And that is where we wish the fee to be. If it needs to be a higher fee, it gets 100 percent compliance, which they do not have now, and it allow a much easier method of collecting funds in the 1990's. I think that is important to understand. Technology is changing.

At what point are they going to be trying to license people who are doing telemarketing from their home with a walkman on? I mean, we are approaching technology and venues of where they can get that they have never been there before. At some point, I think, we have to define the difference between the commercial advantage to music, and the noncommercial advantage.

We would hope that this is the approach of this committee. That you have to define this as incidental, and this would be a for-profit situation. And I know the copyright companies may not like it, but we would certainly like them to have access to income, but do it at the point of purchase; don't have to chase down every operator because I think that is cost prohibitive for them just like it is cost prohibitive for us.

Mr. PATRY. There are different copyright owners though. If you are talking about composers getting their moneys from the sale of compact disks for the performance right, you're missing the point, and that is the record companies and the music publishers are licensing the reproduction right, not the performance right. There are different rights and different copyright owners.

Mr. GREGG. They do get money out from the CD sales, but their argument to it is that it is insignificant. I think it goes up to 2 cents a song per CD. So if it is a million seller, they may get $20,000. That fee may be too small, and we would be certainly happy to ensure that there is a higher fee. But I think it is important to realize 100 percent compliance because if the rumors that we hear that it is only a 20-percent compliance in the industry, that means that 80 percent are not complying, and the potential revenue loss to these composers is great.

Mr. EDWARDS. I have a message that I have to leave. I'm sorry. Mr. Hughes or staff might very well want to submit some questions in writing to you. I am sure you would be cooperative. Minority counsel has no questions, so thank you very much. You gave very good testimony. Very persuasive.

Of course, I haven't heard the other side. My mother used to say that when she was on a jury at a criminal trial, she always found the guy guilty when the prosecutor spoke, but found him innocent when the defense lawyer spoke. I do not think that will happen here. Mr. Hughes is a very fair man as are all the Republicans and Democrats on the subcommittee.

Thank you very much.

The subcommitte is adjourned.

[Whereupon, at 12:18 p.m., the subcommittee adjourned, to reconvene subject to the call of the chair.]

MUSIC LICENSING PRACTICES OF PERFORMING RIGHTS SOCIETIES

THURSDAY, FEBRUARY 24, 1994

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTELLECTUAL PROPERTY,
AND JUDICIAL ADMINISTRATION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:12 a.m., in room 2226, Rayburn House Office Building, Hon. William J. Hughes (chairman of the subcommittee) presiding.

Present: Representatives William J. Hughes, Mike Synar, Xavier Becerra, Carlos J. Moorhead, and Howard Coble.

Also present: Hayden Gregory, counsel; William Patry, assistant counsel; Veronica L. Eligan, secretary; and Joseph Wolfe, minority counsel.

Mr. HUGHES. The subcommittee on Intellectual Property and Judicial Administration will come to order.

Good morning and welcome to the second day of the subcommittee's oversight hearings into the music licensing practices of the performing rights societies.

Today we will hear from choral directors, convention centers, trade exhibitors, and specialty radio stations. It promises, just like yesterday, to be a very interesting and hopefully very productive hearing, and I welcome all of our witnesses today.

The subcommittee has received a request to cover this hearing in part, or in whole, by television broadcast, radio broadcast, and still photography or by any other methods.

In accordance with committee rule 5(a), permission will be granted unless there is an objection. Is there an objection?

[No response.]

Mr. HUGHES. Hearing none, permission is granted.

The gentleman from California.

Mr. MOORHEAD. Thank you, Mr. Chairman, I'd like to commend you for scheduling these 2 days of hearings as they are allowing for the airing of very important issues surrounding the practice of music licensing.

Like all of our witnesses noted yesterday, no one quarrels with the notion that copyright owners of music should be fairly compensated for their creative properties.

However, we have a situation where the performing rights societies operate under a unique set of circumstances as a result of relevant consent decrees. This situation is coupled with the fact that section 110(5) of the Copyright Act, a key provision at the center

of the issues before us, is ambiguous, as evidenced by the fact that it is the most heavily litigated exception in the Copyright Act. I agree with your assessment, Mr. Chairman, that this situation has led to problems with some of the practices that are the subject of these hearings.

As I indicated yesterday to the representatives of the performing rights societies, my hope is that many of the problems that have arisen can be worked out by the parties in interest short of legislation.

While neither side may get everything they want, I think this is the preferable approach at this time. Having said that, Mr. Chairman, I look forward to the testimony of our distinguished witnesses.

Mr. HUGHES. I thank the gentleman.

Our first witness this morning is Dr. Gene Brooks who has had a distinguished career as director of choral music. He has directed numerous choral groups appearing throughout the United States and indeed the world.

Since 1977, he has been the national executive director of the American Choral Directors Association, the organization he represents here today.

From 1982 until 1985, Dr. Brooks was secretary general for the International Federation for Choral Music.

Dr. Brooks received his bachelor of music from Oklahoma Baptist University. He earned a masters and doctoral degree of music from the University of Oklahoma, and has recently completed additional graduate study at the University of Colorado. He is a native of Rush Springs, OK.

Dr. Brooks, we welcome you here today on behalf of the members of the subcommittee.

We've received your prepared statement, which is excellent, I might say, and which, without objection, will be made a part of the record. We hope you can summarize for us, so we can get right to questions, because we have read your written text.

We're just delighted to have you with us this morning. And thank you for coming such a long distance.

STATEMENT OF DR. LESLIE GENE BROOKS, NATIONAL EXECUTIVE DIRECTOR, AMERICAN CHORAL DIRECTORS ASSOCIATION (ACDA), LAWTON, OK

Dr. BROOKS. Thank you, Mr. Chairman and members of the subcommittee, and thank you for the opportunity to be here to speak on behalf of the more than 17,000 members of the American Choral Directors Association.

ACDA, as we are known, has a membership of more than 17,000, representing more than a million singers in the United States. We are primarily an educational organization, members of which are teachers in schools: elementary, junior/senior high schools, colleges, universities. They also direct church choirs and community choirs throughout the United States.

One of the activities of the American Choral Directors Association is our conventions. We have, on odd-numbered years, a large national convention. On even-numbered years, we have seven regional conventions.

In addition, we have State conventions in the 50 States, as well as leadership conferences, workshops, reading sessions, and so forth to educate our choral directors throughout the United States. Our sole purpose is education of the choral directors of the United States.

Our conventions are divided into four categories. First, we have concert sessions in which choirs are invited to come, representing all aspects of choral music. That would be elementary, junior/senior high schools, colleges, universities, all the areas I had previously mentioned.

In these concerts, the choirs are invited to come and present the music that they have learned in school settings. And they come and perform for us, the choral directors of the United States.

The concerts are teaching sessions where new literature is introduced, where literature of, say 200 years old is also performed. It is the showcase of the best choral performance of America.

It is a time when these choral groups can come together and show how much they have learned. They show new techniques, new methods of learning music, and the interpretation of music in these concerts. They are indeed teaching concerts. All of our sessions are described as teaching sessions.

A second aspect of our national convention or regional conventions is what we call interest sessions. That's where the choral directors come together and, say, the choral director of the University of Georgia will come and demonstrate how he has devised a new technique or some aspect he is using to better train the interpretation of literature. These are called interest sessions.

Sometimes at these interest sessions a choir is invited to perform, perhaps a choir that needs more training—and an expert choral director will stand, and they will teach this choir in front of the other choral directors. It's a teaching session on how to make them better.

Third, at these conventions we have music reading sessions, where the composers/conductors bring in music and they will introduce music to the entire body. Sometimes it's new music. Sometimes it's new arrangements of music that has been around for many years. The choir directors sing through this music.

A publisher will send us 500 copies of a piece of music. It is distributed to all the choral directors in attendance. They read through this music in the reading session. They go back then, they purchase the music, and they teach it in their respective schools.

A fourth aspect of our conventions are the exhibits, where those who supply the choral teaching industry, our teachers, with everything from choral risers to groups/organizations who help fund tours, fundraising activities, things to help us, as choral directors, when we go back to our respective schools to teach.

Sometimes in the exhibit area, there may be music played. It's normally music excerpts from pieces that are being introduced, say, a videotape of Doreen Rao, where she is demonstrating—with music—how to train a children's choir. They come by the exhibit booth, and they will see a short segment of this film.

Never, that I can recall, has a choir performed live music in an exhibit area, and I have been the executive director for the past 17

years, and been involved in more than 100 conventions of the American Choral Directors Association.

About 4 years ago, we were contacted first by ASCAP, stating that we needed a license for our conventions. We thought that being a nonprofit teaching, music/education organization that we were exempt, because we are so much different from other trade shows and other conventions where music is used as an entertainment.

But continued letters from ASCAP, and BMI eventually, started a dialog that led into telephone conversations; and indeed, during the past years, we've had actually four meetings with ASCAP.

We are concerned that our conventions and our music teachers are being pressured to buy licenses for their teaching product. We are told that this is no different from other organizations. But at our conventions, we are introducing music. It's our only opportunity, the only way we have, to introduce music to the other teachers of the United States.

I can see no difference in this than a farmer going to town to the Chevrolet dealership and wanting to buy a new Chevrolet pickup, and he asks to test drive it. He wants to see how good it is before he purchases it. He might decide he wants a Ford.

Are we going to levy a fee that the farmer must pay a license before he is eligible to drive the Chevrolet pickup? We can see no difference.

You come to conventions to hear new music, to study music, and reading sessions, to know if you want to purchase it in order to teach it in your choir when you go back to your respective institution.

We think it is "double dipping." Many of our choirs also come from institutions that are required to purchase a license for their own institution. And then they come to our convention, and then we have to purchase yet another license for our convention. Indeed, we believe that is "double dipping."

We are concerned that our composers may also not be treated justly. I have a letter in this document from one of our division presidents, Dr. Milburn Price, at Samford University in Alabama.

He is also a member of ASCAP. He is concerned that if we must start buying licenses, this, indeed, will eventually hinder the composers.

Sir, we do not have the money to fight long lawsuits with organizations. We are teachers, and certainly you can understand that teaching is not the highest paid profession in this country.

In a recent meeting in Lawton, OK, at our national headquarters, we had 97 of the Nations choral music leaders. The presidents of all 50 States were there, the presidents of all the seven regions, and our national officers. At that time, three representatives of ASCAP came and visited with us.

Two of our members at the opening session had had a birthday, so the group sang "Happy Birthday" to them. A member of ASCAP immediately reminded us that we needed a license to sing "Happy Birthday" to our members in that opening session.

We were also reminded in that session, when a question came from one of our, I believe it was, the president of our Oregon chapter who teaches in a junior/senior high school, if his choir goes to

sing in a mall at Christmas, or if they are invited to go sing for the Lions Club, must they have a license? The answer was "yes." Any place where a choir goes to sing, according to their interpretation, they must have a license.

We are disturbed by this because, first of all, choirs don't have the money to buy a license every time they go out to sing. Teaching choral music in a school, that's our subject. It is the same a math, english, history. We teach choral music.

To teach choral music, the end product is to be able to go out and perform the music. You don't teach music just for the sake of preparing in the classroom and never performing. That is performance. That is part of our experience of teaching. To be able to go out and teach—I mean, to go out and to perform what we have learned in a classroom setting.

If now, indeed, we are forced to buy a license, every time we go out to sing, it will certainly curtail the number of concerts we are able to go perform.

Our choirs want to tour. Once they have learned their music, they want to go out and sing it for other schools. They want to go on tours to Europe, or wherever, to give these students a reward for their work.

I think it is terribly wrong that after these young people have gone out and sold cookies, sold fruit, done car washes—everything to raise the money to make these tours—then now they must, and their schools must, buy a license in order for them to sing. This is wrong.

I hope that you will understand that we uphold what we think are the copyright laws of the United States. On all of our membership forms, all of our publications, it states, "In order to be a member of the American Choral Directors Association and in order to perform at conventions, you can not reproduce your music yourself. You must buy copies of all the music that you sing and that you teach in your schools." And we uphold that law.

We think we have done everything that we can possibly do to uphold the copyright law of the United States. But we do believe that we have been treated unfairly by being requested to purchase these licenses for our choirs to go out and sing them.

I have been disturbed by some of the tactics used with me and our organization by members of ASCAP in pressuring us to take a license. In 17 years as executive director of the American Choral Directors Association, I don't believe I have ever been treated so rudely as I was by one telephone conversation from a member of ASCAP in trying to intimidate me to purchase a license for the organization.

When I related this to our officers, they were distressed that yet an organization who represents us, the music people of the United States, would treat another music organization's executive director in the manner I was treated.

We wish to cooperate with ASCAP and BMI, but in our meetings it seems that it's one-sided. It's their side only, and we must accept their way. There is no negotiation with them.

And we sincerely hope that this law can be changed so that we can continue to be the leader in the world in teaching choral music in our country to our children. And I thank you.

Mr. HUGHES. Thank you very much, Dr. Brooks.
[The prepared statement of Dr. Brooks follows:]

PREPARED STATEMENT OF LESLIE BROOKS, PH.D., NATIONAL EXECUTIVE DIRECTOR, AMERICAN CHORAL DIRECTORS ASSOCIATION (ACDA), LAWTON, OK

Dear Distinguished Members of the Subcommittee on Intellectual Property and Judicial Administration:

I want to thank all of you for allowing me the opportunity to speak before you on behalf of the choral directors of the United States. It is with deep appreciation that I come to discuss my concerns regarding a dispute between 1) the American Choral Directors Association (ACDA) and 2) the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI). This dispute stems from ASCAP and BMI's insistence that licensing fees be charged to ACDA for all nondramatic musical performances given at its conventions, workshops, music reading sessions, and meetings at the national, divisional, and state levels of our organization. ACDA seeks assistance from the Subcommittee on Intellectual Property and Judicial Administration to resolve this dispute, either through 1) providing ACDA an exemption from these licensing fees for nondramatic music performed at its conventions, workshops, music reading sessions, and meetings, or 2) through change in the United States Copyright Law with regard to the performance of nondramatic musical works at *music* association conventions, workshops, music reading

sessions, and meetings.

The American Choral Directors Association was established in 1959 to provide an organizational framework with which choral directors from all over the United States could meet their specific professional needs as choral musicians. As a national nonprofit 501(c)(3) educational association, ACDA's central objective has always been to foster the finest in choral music and to nurture the education, performance, composition, publication, and research of choral music in this country.

The American Choral Directors Association is comprised of over 17,000 members who represent more than one million singers. Members of our association make their living by teaching choral music in all types of educational and church settings and by conducting choirs of all types, sizes, and levels of performance ability. ACDA members work in America's elementary and secondary institutions of learning; they teach in America's colleges and universities; they provide a leadership role in the music of America's churches and synagogues; they conduct amateur and professional choirs throughout our country; and they work in music industries that deal directly or indirectly with the choral art.

The American Choral Directors Association was organized so that each individual member could have a direct link to the organization's leadership. Divided into seven geographic divisions and fifty state chapters, each ACDA member can make direct contact with ACDA leaders, thus making our leaders responsive to the needs of its constituency. In addition, ACDA has developed numerous committees which address specific areas in the choral field, thus adding to the direct involvement of ACDA members in their organization.

The American Choral Directors Association prides itself in the numerous services it offers to its membership. One of the most significant of these is the *Choral Journal,* the official publication of the American Choral Directors Association. Issued monthly, except for June and July, this national publication, read by ACDA members throughout the world, contains valuable articles of an educational nature, enabling the choral professional to advance his or

her knowledge of choral music and the issues which concern choral professionals. In addition, ACDA publishes many other publications, including division and state newsletters, a national newsletter geared toward student conductors (the future choral directors of America), and monographs designed to aid those involved in choral research.

Other resources include a videotape series and grant and fellowship programs for furthering the research and knowledge of choral music.

The Purpose of ACDA Conventions, Workshops, Meetings, and Music Reading Sessions

Foremost among ACDA's services are its conventions and workshops, which are organized and implemented by ACDA members themselves. Each odd-numbered year, ACDA sponsors its national convention, while in even-numbered years the seven ACDA divisions execute their respective conventions. (This winter ACDA is conducting its division conventions. You may be interested in knowing that ACDA will hold its next national convention here in Washington, D.C., in March of 1995.) In addition to the national and division levels, state-level conventions are offered throughout the calendar year by each state chapter.

ACDA conventions—whether at the state, divisional, or national level—are exclusively ACDA affairs. They are organized and executed by ACDA members, who are unpaid volunteers willing to spend much time and effort ensuring that each convention adheres to ACDA's purpose of furthering the educational needs of its members. Those who attend ACDA conventions are exclusively ACDA members and their guests. And, the conductors who perform at ACDA conventions are also ACDA members.

The American Choral Directors Association executes conventions every year for one sole purpose—the education of ACDA members in the latest developments in the choral music field, regarding such issues as interpretative style, conducting technique, and performance practices. ACDA members leave conventions with new knowledge about their profession,

and when they return to their schools, they pass this new knowledge on to their conducting students and/or singers. In order to make the most out of just a few days at any convention, ACDA provides the following educational settings:

1. **Concert sessions.** Nearly half of an ACDA convention is devoted to concert sessions of choral music performed by the finest choirs and conducted by this country's leading figures in the choral art. These sessions offer the perfect opportunity for ACDA convention attendees to experience their best colleagues at work on the podium; doing so provides ACDA members the opportunity to gain new insights into the subtleties of conducting gesture.

2. **Interest sessions (clinics).** Pedagogical sessions at ACDA conventions provide ideal learning environments for choral directors to expand their knowledge of particular conducting techniques, choral research, and/or performance practices. These sessions are directed by one or more clinicians and may include the performance of a demonstration choir to enhance the session's learning objective.

3. **Music reading sessions and breakfast roundtables.** Both of these types of sessions are designed to address the needs of specific types of choirs, such as male choruses, vocal jazz ensembles, symphonic choirs, etc. Clinicians often direct these type of sessions, and choirs may also demonstrate choral repertoire.

4. **Exhibits.** Exhibit halls at our conventions allow ACDA members the opportunity to meet face to face with representatives from music industries, whether they be music publishers, computer software producers, fundraisers, or recording companies.

At each of these educational settings (with exception, perhaps, to exhibits) nondramatic choral music is performed. These performances are what ACDA is all about. An entire ACDA convention, whether it be at the state, divisional, or national level, is a complete music-learning experience. This is the reason why there is a dispute between ACDA and ASCAP/BMI.

Why ACDA Conventions and Meetings Should Be Exempt from Licensing Fees Levied by the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI)

Our difference with ASCAP and BMI stems from the fact that neither of these organizations distinguishes between nondramatic musical performances at conventions, workshops, music reading sessions, and meetings that our type of organization—an educational *music* association—sponsors, versus the nondramatic musical performances that take place at *nonmusic* trade organization conventions. What ASCAP and BMI ignore is the fundamental difference in the nature of performance between nondramatic music at *music* versus *nonmusic* convention settings. Music performed at *nonmusic* trade shows and conventions serves a purpose *other than the music itself;* that is, the performed music may serve either to entertain the listener or be utilized to enhance the promotion of a nonmusical product or service, ultimately for profit gain. In either case, the music itself is not served, and thus the composer receives no benefit for his or her work beyond the initial contractual arrangement for compensation made between the composer and publisher. This is why licensing organizations like ASCAP and BMI were established in the first place, so that composers could receive compensation for their music whenever subsequent performances of that music did not benefit the composer directly.

Nondramatic music performed at *music* association conventions, such as ACDA conventions, does, however, benefit the music itself, and thus the composer and publisher as well. Performances at ACDA conventions are not designed to be merely "entertaining" performances. In fact, I would venture to say that most attendees at ACDA conventions would be deeply offended if they were described as being "entertained" during a performance; this would imply that they passively listen to their colleague's music, when, in fact, they are very busy studying and learning from a colleague's performance. Instead, ACDA conventions provide members the opportunity to gain new insights into choral performance, both

through the conducting they experience and the choral repertoire they hear. And regardless of whether the music they hear is old or new repertoire, performances of music at ACDA conventions add to the longevity of that music: if the choral piece is a standard one that has stood the test of time, its performance at an ACDA convention could be an indicator that it will continue to remain in print; if the choral piece is new to listeners, then its performance at an ACDA convention could serve to introduce the work to an audience of people who, if they like it, will want to buy it and perform it in other public settings. Whether old or new, choral works performed at ACDA conventions receive very beneficial exposure; when those works are bought and performed as a result of an ACDA convention, the composer eventually benefits from the compensation he or she receives from ASCAP or BMI through regular public performances (other than ACDA conventions).

ACDA is also disturbed by the fact that ASCAP and BMI already levy licensing fees to the host institutions of choirs performing at ACDA conventions. Many universities, for instance, have already paid a licensing fee for their choirs to perform on the university's campus, but ASCAP seeks an addition fee if they perform at an ACDA convention. In our estimation, this constitutes "double dipping" and cannot possibly fall within the original intent of the United States Copyright Law.

Another point I wish to make is that many ACDA *composer* members are also members of ASCAP and BMI. They recognize the mutually beneficial relationship shared between ACDA and licensing organizations. They know that when their music is performed at an ACDA convention, they are receiving more exposure than any advertising of their piece could bring them. Please refer to the letter addressed to Rep. Mazzoli by my colleague, Dr. Milburn Price, of Samford University, who, as a both a composer and member of ACDA, shares his feelings with regard to this issue.

I also refer you to a letter addressed to Rep. Robert Smith, written by William F. Mayclin, President of the Northwestern Division of ACDA and a high school choral director. Mr.

Mayclin is deeply concerned about ASCAP licensing procedures with respect to ACDA conventions. In addition, he is even more concerned about the kinds of pressures which could be expected in the future by licensing organizations. At the 1993 ACDA Leadership Conference, held last August in Lawton, Oklahoma, ASCAP representatives discussed their legal right to levy licensing fees for music performed in our public schools. As you know, our public schools are already suffering from their share of financial burdens, and I think it is quite clear that if these licensing fees become more stringently enforced, they will place undo financial burden on the public schools of this country.

Finally, I wish to express another difficulty ACDA has with ASCAP and BMI. Both of these licensing organizations have demonstrated an inability to track down the exact number of performances of music taking place in this country. If this cannot be accomplished, then it is unlikely that the composers, which these licensing organizations serve, are receiving perfectly fair compensation for their music.

Conclusion

The American Choral Directors Association complies with the United States Copyright Law. Compliance with copyright law is a condition of participation by clinicians and performing groups at all ACDA events. We recognize that this is in the best interest of all musicians, whether they be composers, conductors, or performers. However, we feel very strongly that ASCAP and BMI are going beyond the original intent of United States Copyright Law in their levying of licensing fees for nondramatic music performed at ACDA events. This is why we are coming to the House Subcommittee on Intellectual Property and Judicial Administration for your help in resolving this dispute. We look forward to your assistance and hope that you will be able to resolve this dispute, either by providing ACDA an exemption from these licensing fees for nondramatic music performed at its conventions, workshops, music reading sessions, and meetings, or by changing the United States Copyright Law with regard to nondramatic music performed at *music* association conventions, workshops, reading sessions, and meetings.

I sincerely thank each of you for taking time to listen to ACDA's concerns regarding this dispute.

Samford University School of Music
Birmingham, Alabama 35229 U.S.A. 205/870-2851

February 4, 1994

Representative Romano Mazzoli
2246 Rayburn House Office Building
Washington, DC 20514

Dear Representative Mazzoli:

I have recently moved from Louisville, Kentucky to Birmingham, Alabama to accept a position at Samford University. During my twelve years in Louisville, I appreciated the responsible representation which you gave to our district in Washington.

I am writing related to an issue which will soon come before the House Judiciary Committee. Dr. Gene Brooks, Executive Director of the American Choral Directors Association, will soon be testifying before the Judiciary Committee in a matter related to the manner in which ASCAP and BMI are attempting to license performances for conventions of organizations which are basically education-oriented, such as the American Choral Directors Association (ACDA) and Music Educators National Conference (MENC). As a member of both ACDA and ASCAP, I disagree strongly with the approach which ASCAP has taken to attempt to treat conventions of music educators in the same manner they would treat a trade show as relates to licensing fees.

As a composer affiliated with ASCAP, I am aware of the great importance which exposure of my compositions at regional and national conventions of ACDA and MENC has to sales of my music in print. Indeed, these conventions serve as a major means of promotion of the music of American composers. A potential net effect of stringent licensing regulations for these organizations would be harmful to, rather than helpful to, the cause of American composers. Further, there is an issue of "double-dipping" which seems to apply. Most of the choirs which perform at such conventions represent institutions which themselves have established licensing agreements with ASCAP and BMI.

I recognize that the issues are complex related to this matter. However, it does seem highly inappropriate for educational organizations such as ACDA and MENC, which are non-profit professional organizations serving the needs of music educators, to be treated in the same manner as trade shows, which exist for the sake of commercial profit, in matters of music licensing.

Dr. Brooks should be able to represent our concerns in an articulate manner. I hope that you will listen to him carefully.

Sincerely,

Milburn Price, Dean
School of Music

MP.ja

bcc: Gene Brooks

THE AMERICAN CHORAL DIRECTORS ASSOCIATION
NATIONAL HEADQUARTERS / THE CHORAL JOURNAL
Post Office Box 6310 Lawton, Oklahoma 73506
(405) 355-3161 FAX (405) 248-1486

February 4, 1994

Robert F. "Bob" Smith
U.S. Representative
Oregon Second District
108 Cannon House Office Bldg.
Washington, D.C. 20515

Dear Rep. Smith:

It has come to my attention that there will be a congressional hearing later this month regarding the licensing practices of organizations such as the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI). I feel compelled to write to you because these organizations have begun to target conventions sponsored by such groups as the Music Educators National Conference (MENC) and the American Choral Directors Association (ACDA). ASCAP and BMI are demanding that these educational organizations buy licenses to cover performances by public school, community, church, college and university ensembles at these conventions. To say the least, these demands incense me greatly.

My own organization, the American Choral Directors Association, sponsors many conventions, workshops and clinics on the national, regional and state levels. We invite choirs to perform at these events in order to recognize a "job well done" and to showcase quality music which is available and performable by groups of varied ability levels. As a result of these performances, many choral directors purchase this music for performance by their own choirs.

The reality is that if ASCAP and BMI are successful in their attempts to levy licensing fees for these types of workshops and clinics, there will eventually be fewer and fewer such events. Organizations like ACDA and MENC simply cannot afford to pay licensing fees for all of the events they sponsor.

ASCAP and BMI exist for the purpose of protecting the rights of composers and publishers. ACDA respects

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School of Music
University of Iowa
Iowa City, IA 52242

PRESIDENT-ELECT
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College of Music
University of Colorado
Boulder, CO 80309

TREASURER
ELAINE McNAMARA
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Pompano Beach, Florida 33062

CHAIR
PAST PRESIDENTS COUNCIL
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EDITOR,
THE CHORAL JOURNAL
JOHN SILANTIEN
Division of Music
University of Texas at San Antonio
San Antonio, Texas 78249

these rights, and we do not in any way tolerate or excuse the illegal use of music. We do, however, encourage choirs to buy and perform the music of composers and publishers.

If we eventually cannot afford to sponsor conventions and workshops because of licensing fees, composers' music will not be as readily heard, and less and less music will be sold. It seems to me that if composers can't market their music, ASCAP won't have to worry about protecting the composers' rights. So, is ASCAP really protecting the rights of its constituents if its very practices will make it less possible for composers to have their music heard? I think not!

Another matter of concern regarding ASCAP licensing procedures involves a statement made by ASCAP representatives at an ACDA Leadership Conference I attended in Lawtoff, Oklahoma last summer. They stated that ASCAP has the legal right to demand that public schools buy licenses for bands, orchestras and choirs so that they may legally perform and rehearse music in the community and public school setting. They aren't currently enforcing this, but the implication was definitely there that this could be forthcoming in the future. Now, can you imagine that! As a high school/junior high music teacher, this concerns me very much. We are having enough trouble in Oregon keeping music education afloat in our public schools thanks to the lack of funding created by Ballot Measure 5. If ASCAP comes into our schools and requires us to buy licenses for our school music groups, I think this would be the death knell for public school music education in the state of Oregon. We'll be lucky to survive in the next few years as it is.

I am resolute in my belief that the rights of our composers and publishers must be protected, but I also believe our ability to perform music in educational settings must be encouraged and protected. Some restraints need to be placed on ASCAP and BMI. Licenses are appropriate in many cases, but licenses for conventions, clinics, workshops and public schools, whose sole purpose is educational in nature, will "kill the goose that laid the golden egg" for composers and publishers.

Please consider this matter carefully. It is of vital importance to me, my colleagues and my students.

Sincerely,

William F. Mayclin
President
ACDA Northwestern Division

Mr. HUGHES. We have been joined by a very distinguished member of the Subcommittee on Intellectual Property and Judicial Administration from Oklahoma, who is extremely knowledgeable, I might say, on intellectual property issues.

And since you are from Rush Springs, OK, as I understand it, I will at this point recognize the gentleman from Oklahoma, Mr. Synar.

Mr. SYNAR. Thank you and I appreciate that.

And Dr. Brooks, I apologize for being late but my schedule has not been very generous to me this morning. I want to welcome you and the other witness from Oklahoma today for being here.

Let me start by saying, how many groups would be affected, just in the State of Oklahoma, if we were to require you to meet the standards that you just laid out?

Dr. BROOKS. We have approximately 450 members in Oklahoma, and on an average each choral director will direct four or five choirs. So we are talking about more than 2,000 choirs.

Mr. SYNAR. And how many—I know this may be impossible—how many songs during a year would those choirs perform that would be affected by this?

Dr. BROOKS. Oh, it could be 20,000 to 25,000.

Mr. SYNAR. How would you enforce this if you were going to have to? Is it possible to even comply?

Dr. BROOKS. It would break our organization. We simply could not do it.

Mr. SYNAR. There is no self-enforcement mechanism that could be done?

Dr. BROOKS. I don't believe so, to enforce it to the law. We simply don't have the time. We don't have the energy, we don't have the resources, the money, to do such.

Mr. SYNAR. Mr. Moorhead, I think, in his opening statement suggested something I thought was particularly interesting. Is there a way that the groups and the parties affected by this could sit down and work this out that would be less than the legislative effort that is being suggested? Is there a meeting place for the groups?

Dr. BROOKS. As I stated, we've had four meetings with ASCAP, and we have had no results. It's always, "Here is the law, you must pay." And they will say, "Yes we will meet with you." But when they meet, it's always, "Yes, this is the law, and therefore you must pay."

Mr. SYNAR. So they haven't been interested in seeing if there is some distinguishing differences between you and the normal process?

Dr. BROOKS. No, there has not been.

Mr. SYNAR. And so using the present law is really the leverage?

Dr. BROOKS. Exactly.

Mr. SYNAR. There's been absolutely no proposals or options presented to you to consider?

Dr. BROOKS. Other than sending us bills in an amount of money. In fact, here is the last one I received. And each one seems to be different. I received one dated February 12—I'm sorry dated February 7—in which they are asking us to pay $13,240.

We can't do it. We will have to close the organization.

Mr. SYNAR. What would you recommend that this committee do in this situation?

Dr. BROOKS. We believe by being teachers, and teachers of choral music, a tax-exempt organization, with the sole purpose of teaching music in schools, colleges/universities, and worship services in churches—preparing our choirs for worship service—that we should be exempt.

Mr. SYNAR. And would you exempt you if you do radio and TV performances?

Dr. BROOKS. We don't do radio and television.

Mr. SYNAR. But if choral groups did do that, should they be exempt?

Dr. BROOKS. No.

Mr. SYNAR. So that would distinguish you from the present situation?

Dr. BROOKS. Yes. We are talking about our education conventions and our educational performances of our choirs.

Mr. SYNAR. But beyond that you think that there would be legitimate right?

Dr. BROOKS. Yes.

Mr. SYNAR. Thank you Mr. Chairman.

Mr. HUGHES. The gentleman from California.

Mr. MOORHEAD. Thank you. It's nice to have you here this morning. It's certainly an interesting profession.

You've had a number of talks with ASCAP folks, but that was before this legislation was coming to a point. I think that both the chairman and myself indicated that it is time to talk, to get down to brass tacks and try to come to some kind of an agreement.

You feel certain that regardless of the possibility there might have to be legislation, that they would take the position, this is the law and so we can't talk?

Dr. BROOKS. Yes, sir, I do.

Mr. MOORHEAD. What makes you think that?

Dr. BROOKS. For one thing, I think as the law reads now, we would not be exempt. And we very much believe we should be exempt—because we are teachers—if we are licensed. And there are many other teaching areas that probably would need to be licensed, in some respect.

Mr. MOORHEAD. They have made claims on you through the years and asked for money. How much have you paid them all together?

Dr. BROOKS. We have not paid them.

Mr. MOORHEAD. And have they brought lawsuits against you?

Dr. BROOKS. No, but we have been threatened.

Mr. MOORHEAD. You have what?

Dr. BROOKS. We have been threatened with lawsuits.

Mr. MOORHEAD. But nothing has gone beyond that point?

Dr. BROOKS. No, sir.

Mr. MOORHEAD. So they haven't been willing to put any money into a lawsuit in order to collect the money.

Do you know of any similar organizations or societies that have paid them money?

Dr. BROOKS. Yes, one, under duress.

Mr. MOORHEAD. Under threat of a lawsuit?

Dr. BROOKS. Yes.

Mr. MOORHEAD. Do you know of any lawsuits that have been filed?

Dr. BROOKS. Not against music education organizations. I know of one other music education organization that is in the same situation that we are. They have not paid, and they feel the same way we do. It's a very large music education organization.

Mr. MOORHEAD. But they have been sued?

Dr. BROOKS. No, they have not, as far as I know.

Mr. MOORHEAD. Well, they aren't making very much money off of you then, obviously. And I can't see why they wouldn't have a reason to discuss this issue with you. They don't have much to lose here. They are not collecting any money from you.

Dr. BROOKS. The reason they haven't collected money is because we have felt all along that we should not be assessed this fee because of our teaching——

Mr. MOORHEAD. I know but they haven't even been willing to bring a lawsuit against you though. They haven't taken any steps to collect.

Dr. BROOKS. That is why we are here today, to try to prevent that lawsuit. We can't afford it.

Mr. MOORHEAD. You don't know of any lawsuits that they have brought against any similar organizations at all then?

Dr. BROOKS. Not that I am aware of.

Mr. MOORHEAD. Those are all the questions that I have.

Mr. HUGHES. Dr. Brooks, one of the exemptions in section 110 of copyright law is performance or display of a work by instructors or pupils in the course of a face-to-face teaching activities of a nonprofit educational institution in a classroom or similar place devoted to instruction, et cetera, which goes into motion pictures and other things. Have you discussed that section at all with ASCAP?

Dr. BROOKS. Yes, we have.

Mr. HUGHES. And what was their—I'm interested in their response to that.

Dr. BROOKS. This summer in our leadership conference, we discussed this area. In fact, we talked about our practicing of music. And the statement was made, and it's documented here in—I believe it is number nine and it is tabbed—that even if we are practicing in a practice room and students or anyone comes by to listen to us, that is considered a performance. Therefore, it would need a license. And that is in a teaching situation.

If a choir is in rehearsal at a high school in New Jersey and a group of people come and they want to hear this choir in rehearsal, they said this was a performance.

Mr. HUGHES. But do they require a license if it is an instructional public performance?

Dr. BROOKS. Yes, sir.

Mr. HUGHES. I'm fascinated by this particular nuance. Because if I hear you correctly, you believe that in each instance where a choir sings music you should have an exemption? Do I understand you correctly?

Dr. BROOKS. Yes, sir.

Mr. HUGHES. And why is that? Why shouldn't a choir that publicly performs a work, be licensed like anyone else?

Use the analogy of somebody that goes to a Chevrolet dealership, a farmer, and wants to take that truck out for a demonstration ride before he buys. Would you concede that it would be up to that Chevrolet agency to decide whether he wants to permit that? Suppose that I decided as a manager of a Chevrolet agency I didn't want you to take a demonstration drive, shouldn't I have that right to do that?

Dr. BROOKS. Yes, you would, but then as a farmer you probably wouldn't buy the Chevrolet.

Mr. HUGHES. Well, that's OK. That is the market forces working. But isn't that true of a copyright owner? Shouldn't the copyright owner be able to say what uses his work should be put to? What's the difference between the two situations?

See, frankly, I agree with you. If I want to sell that car, perhaps I might want to think twice about refusing that demonstration drive. But if I'm a copyright owner of let's say a song, why shouldn't I have the same right, to decide what uses I want to put it to? That is what the statute basically says, with some exceptions.

Dr. BROOKS. Many of our members, who are composers, are also members of ASCAP. And they say that one of the best places to sell their music and get their music introduced to the choral teachers is at our conventions. They don't want to be licensed there. They want their music performed. They want their music——

Mr. HUGHES. That may be so, and I don't dispute that. It may very well be, and I am somewhat persuaded that you might be correct. Perhaps performing this music at a convention, where there is some teaching as well as some displays, might be good business.

But shouldn't I have the right, as the owner of that particular property, intangible though it may be? It might not be tangible property like a truck, which you can see, and I could, as a businessman say, "You can't take that for a demonstration drive."

Dr. BROOKS. Yes, you could.

Mr. HUGHES. Why shouldn't a copyright owner be able to say the same thing about his intangible property?

Dr. BROOKS. They can.

Mr. HUGHES. Well that is what they have done.

Dr. BROOKS. Yes.

Mr. HUGHES. That's what they've done. Now maybe, as a matter of policy, we should review section 110 to see whether it is broad enough, whether it catches enough uses that are in the public interest that we permit. That is a balancing that this committee can do.

Dr. BROOKS. Yes.

Mr. HUGHES. That is a different issue though. But you do concede that ASCAP has a right to deny you that license if they want?

Dr. BROOKS. Yes, they do have.

Mr. HUGHES. OK.

Mr. MOORHEAD. Would the gentlemen yield?

Mr. HUGHES. I'd be happy to yield.

Mr. MOORHEAD. You know, the way it looks to me is that we are not arguing over dollars because no dollars are being paid back and forth.

It may be that ASCAP doesn't want to tell you that it is OK because they are afraid if they give up a right to control their copyright that other people will move in on a much broader level than yours.

But so far, it would appear that other than a few people asking you for money occasionally, and none being paid, that they are just saying, well we've got this right, but we are not going to do anything about it.

And it isn't hurting anybody. They are maintaining their right to control, if they want to, but they sure are not doing anything to collect any money or to bring any suits.

It's just, they are saying, well, this is ours, you're not bothering if you use it, really, and it's just a standoff; but nothing has happened.

Dr. BROOKS. To this point, but we believe—at least, they have been threatening lawsuits against us.

Mr. MOORHEAD. You know, a lot of people threaten lawsuits though.

Dr. BROOKS. It's not comfortable though.

Mr. HUGHES. Let me just ask you, if I might, one additional question. You also object to what you call "double dipping." And I thought that you did a very good job of laying that out in your statement.

That is charging the university for performances on campus and off campus. Presumably, the fee for on campus only takes into account on campus activity.

Is it your testimony that the combined fees are too high, or that there should be no licensing of off campus performances?

Dr. BROOKS. We believe that if the university is buying a license fee, say the University of Oklahoma, that the choir has the right to go out and perform in the high schools of Oklahoma.

Mr. HUGHES. Maybe what they should be doing when they negotiate that fee is to take into account that it includes both off campus and on campus activity.

Dr. BROOKS. That's possible.

Mr. HUGHES. Wouldn't that be more logical? Not that I've seen much logic in the manner that this particular law is being administered in this so-called "incidental use" area. I don't see a great deal of logic but wouldn't that address the problem?

Dr. BROOKS. It would address that part of the problem.

Mr. HUGHES. In many instances the licenses, as I understand it, cover just on campus, but off campus requires a different type of dues.

Dr. BROOKS. But if the university goes, then, and performs in a hall where they have also purchased a license, say the University of Oklahoma goes to perform at the University of Kansas, and the University of Oklahoma has purchased a license, and yet a second license is required for that OU choir to perform at the University of Kansas. It seems that that is "double dipping."

Mr. HUGHES. I beg to differ with you. I don't know why that's the case. That license is for that particular university, not a visiting university. That's a different use.

Now it may very well be, as a matter of policy, that we should take a look at that. But I don't see that that's "double dipping" because that license was for that particular university and their choir.

Often, as I understand it, and correct me if I'm wrong, when a license is granted to the University of Oklahoma or any other choral group, that's for particular uses, generally at the university.

And I would think that if the university wanted to also license performances, let's say for visiting other universities or other events off the campus, that would be something to negotiate. Am I wrong on that?

Dr. BROOKS. Possibly so.

Mr. HUGHES. Possibly, I'm wrong?

Dr. BROOKS. I'm not sure at this point. But also, I don't think it's right for a high school in Little Rock, AR, that wants to go perform in a mall to have to buy a license to sing in that mall, or sing for a nursing home, to have to purchase a license to go sing in that nursing home.

Mr. HUGHES. Well that may very well be as a matter of policy. Of course, the mall presents another problem because now you are talking about public performances for, let's say, humanitarian, or charitable, or community purposes.

What you are arguing, I presume, is that perhaps the choir should have an exemption. I'm not saying that as a matter of policy we should not consider it, but it's not covered, it seems to me now, unless when that particular university negotiates their license, they include that within the license.

Dr. BROOKS. It's complex.

Mr. HUGHES. Well, I think we've decided it's not only complex, but we have waded into a real thicket.

The gentleman from North Carolina.

Mr. COBLE. Thank you Mr. Chairman. You and the gentleman from California pretty well touched the bases I had planned to touch.

Dr. Brooks, it is good to have you with us. Unlike you, sir, I am not musically talented, but I am an appreciator of music.

Having said that, I am concerned about protecting copyright owners, authors, and composers. They have put blood, sweat, and tears into their work, and they should be compensated.

By the same token, I can appreciate the frustration that people such as you and operators of restaurants and taverns across the countryside encounter as this business continues to develop.

I think, perhaps, the word might be "incidental." For example, I am driving in my district, and I have been deprived of my breakfast and my noon meal, and I'm ravenous. I see an advertising sign that says "fried chicken and barbecue 5 miles ahead," and I pull into the establishment there and consume my meal, and incidentally, music is piped in. I can see a good argument there, Mr. Chairman, that the proprietor might say, "Well this guy came in to eat my good barbecued chicken, not to listen to music."

Unfortunately, it is not going to be that easy, I think, to cut into societies. You and I were talking on the elevator, Mr. Chairman, coming up here.

I'm uneasy about the fact that we have received countless complaints during the past several years from operators of these establishments. I don't mean to be indicting ASCAP, because ASCAP consists of good people as well.

But they'll come in and say, "OK, pal, you owe us $750." Well, oftentimes the operator of this establishment doesn't know the law, and probably doesn't have the wherewithal to retain counsel to defend himself, if in fact litigation is forthcoming.

It is very provocative and very interesting, and I think much of what you said is on the money. But by the same token, when you answered the chairman's question, you very candidly said you didn't know, and I think many times we don't know. If you could wave a wand and resolve it, I guess you wouldn't have to have these hearings, Mr. Chairman.

Let me put two questions to you, Dr. Brooks. I'm just rambling, but these are problems that plague me as we get into this thing more deeply.

Do you have any indication, Dr. Brooks, whether or not ASCAP or other people attempting to collect these moneys have begun seeking licensing fees for music performed in public schools? I'm not suggesting they do, but do you know about this?

Dr. BROOKS. I don't know. This question was asked of ASCAP at our leadership conference this summer, and they said they didn't have the forces to police every school, in the United States.

Mr. COBLE. The reason I ask this, Mr. Chairman, this could be a mounting problem, because public schools are plagued severely enough now. And if this were to come into play, this would just be another problem. So you don't know one way or the other about that?

Dr. BROOKS. I don't know for sure. I do know this, that in the conversation this summer, that they said by law the schools should have a license.

Mr. COBLE. OK. If you learn any more about that, Doctor, I'd like to know, if you come across additional information. That would be, I think, interesting to the subcommittee.

Permit me, Mr. Chairman, to ask one final question. Dr. Brooks, in your statement, page 7 I believe it was, you indicate that both ASCAP and BMI have demonstrated an inability to track down the exact number of performances of music taking place in this country. And if this can not be accomplished, then it is unlikely that the composers are receiving fair compensation for their music. Elaborate for me on this point, if you will.

Dr. BROOKS. Again, at the leadership conference this summer in Oklahoma, an ASCAP representative said it was impossible to track all the performances of choral music in the United States by all the choirs.

And they come up with a formula in which they assess these and a formula in which they say that they return revenue to the composers.

Mr. COBLE. Well, I thank you. Mr. Chairman, I guess the haunting memory I'll have of this hearing is the fact that you had to pay, or allegedly had to pay, to sing "Happy Birthday." Now that is cutting it pretty finely. What resulted from that exchange?

Dr. BROOKS. We sang "Happy Birthday" to two of our member State presidents. And we were reminded that "Happy Birthday" was an ASCAP song and that it would indeed need to be licensed. But we didn't have a license.

Mr. COBLE. But you submitted no moneys to that effect.

Dr. BROOKS. No, we didn't.

Mr. COBLE. And that is the last you heard from it?

Dr. BROOKS. Yes.

Mr. COBLE. OK. Thank you, Dr. Brooks. Thank you, Mr. Chairman.

Dr. BROOKS. Mr. Chairman, I would like to say one closing comment. We appreciate ASCAP and BMI. We appreciate what they do for the choral composers of this country.

Many of our members are members of ASCAP and BMI. And we appreciate what they do to uphold the laws and to try to compensate our composers. Our concern is that we be treated justly and fairly.

Mr. HUGHES. Yes, I think you probably echoed the sentiments of the members of the committee, too. And it's no criticism of the great work that these collecting societies do. They perform a very, very useful function.

Unfortunately, the law is not very clear in many respects. And that's created much of the problem, as I indicated in my statement yesterday.

But, Dr. Brooks, you have been very, very helpful to us today, and we appreciate it. You've helped me also draw out from my colleague from North Carolina where he draws the line. It's at the "Happy Birthday" song. That's where he draws the line.

Mr. COBLE. Yes. Well that's where I draw one of the lines, Mr. Chairman.

Mr. HUGHES. I see. All right.

Thank you very much, Dr. Brooks, we appreciate your help.

Our first panel this morning consists of representatives of the convention, auditorium, and trade exhibition industry.

The first witness, Bob C. Mayer, has been the general manager of the Tulsa Convention Center since June 1984. Prior to that, he was the assistant managing director of the Tulsa Performing Arts Center, and assistant manager of the Myriad Convention Center, Oklahoma. He's a graduate of Oklahoma City University.

Mr. Mayer has also been a member of the International Association of Auditorium Managers since 1982. He served on the organization's board of directors and was its president during fiscal year 1992 to 1993.

Our next witness, John S. Swinburn, is executive director of the International Association of Auditorium Managers. The IAAM has 2,000 members throughout the world, comprising managers and senior executives from auditoriums, arenas, convention centers, stadiums, and performing arts theaters.

Mr. Swinburn has been working in association management for 15 years, and holds a bachelor of arts degree from the University of Texas at Austin.

The third witness is Jerald A. Jacobs. Mr. Jacobs, if you'll come forward. Mr. Jacobs is a partner in the law firm of Jenner & Block here in Washington, DC.

He is the head of the firm's association practice group and serves as legal counsel for the National Trade Association, professional societies, and nonprofit organizations.

Mr. Jacobs appears as special counsel for the American Society of Association Executives, some 20,000 professionals, who manage associations at National, State, and local levels. As special counsel, he advises the society in many areas including music licensing.

We have your statements, which are rather comprehensive. They will be made a part of the record, without objection, and we hope that you can summarize for us so we can get right to questions. We thank you for being with us today.

Why don't we begin with you, Mr. Mayer. Welcome.

STATEMENT OF BOB C. MAYER, GENERAL MANAGER, TULSA CONVENTION CENTER, TULSA OK

Mr. MAYER. Thank you very much, Mr. Chairman and members of the subcommittee. Good morning. I am the general manger of the Tulsa Convention Center in Tulsa, OK, which is a municipally owned and operated public assembly facility, owned and operated by the city of Tulsa.

Our facility includes a 9,000 seat arena, in addition to other space that you would typically find in a convention center, such as an exhibition hall, conference space and so forth.

Our facility hosts a wide variety of events from sporting activities and entertainment events, to circuses and international conventions, to small receptions to major banquet functions.

I've been associated with the public assembly facility management industry for the past 20 years in Oklahoma City and Tulsa.

In addition, I am the immediate past president of the International Association of Auditorium Managers, which represents 1,250 public assembly facility managers throughout the United States.

My testimony today is really on behalf of the city of Tulsa, but also represents the feelings of a number of my colleagues in the industry.

Mr. Chairman, before I begin and on behalf of our mayor, Mayor Susan Savage, and the city of Tulsa, I would like to thank you and the other subcommittee members for examining the impact of the Federal Copyright Act of 1976.

Because we play an important and unique role within our respective communities, it is important that Congress understands how current copyright legislation impacts our industry and the people that we serve back home.

To be concise, we feel that existing copyright legislation makes public assembly facility managers and their State or local governmental employers potential defendants in copyright infringement cases, due to the legal concept of vicarious liability.

The Federal Copyright Act provides authors and composers with fundamental protection against copyright infringement, and we, as an organization, and as an industry, are not opposed to such protection. In fact, it is vital for authors and composers to be fairly compensated for their works, if our society is to benefit from the diversity of entertainment that we all enjoy.

It is our belief, however, that those who promote, perform, or cause recorded music to be played during an event should bear the sole responsibility for payment of copyright license fees, unless the public assembly facility is indeed the promoter or copromoter or sponsor of the event.

In the United States, virtually every city has at least one public assembly facility which, for the purpose of this discussion, is defined as an arena, a stadium, a convention center, performing arts theater, an exhibition hall, or a similar place where the public might gather.

Seating capacity's for such venues can range from less than 100 to over 100,000. They house a wide variety of events, as you can imagine, which appeal to almost every age group and social stratum.

Management of public assembly facilities is complex and challenging, and because of varying rules, regulations, policies, and local ordinances, some such facilities in certain States are able to fully promote or copromote events in their communities. Managers of public assembly facilities who can promote or copromote such events should not be exempt from compliance with copyright legislation, since by the very nature of promotion, they share in the profits of the production.

Other facility managers, however, are restricted to simply renting the facilities to outside promoters and event organizers. Public assembly facility rental arrangements in this instance will range from a flat rental fee to a minimum rental guarantee, plus a small percentage of ticket sales.

In either case, the facility and the State, county, or local owners and operators of the facility do not participate in the risk of presenting the event, and they don't participate in actually controlling the music that's being played.

It is in this type of rental arrangement and facility operation, which we feel should be exempt from the doctrine of vicarious liability, as it relates to existing copyright legislation. Mr. Chairman, we feel that a provision should be considered by the Intellectual Property and Judicial Administration Subcommittee, which would overturn the doctrine of vicarious liability under current copyright legislation, specifically for publicly owned public assembly facilities.

And, further, it would be appropriate to include a provison which would only exempt such facilities if they informed their tenants that they, indeed, have certain responsibilities in accordance with Federal copyright legislation.

We are pleased that the subcommittee is examining the effects of the Federal Copyright Act of 1976 on States, counties and municipalities, and hope that the insight presented by this testimony will be helpful to your deliberations.

Thank you very much.

Mr. HUGHES. Thank you, Mr. Mayer.

[The prepared statement of Mr. Mayer follows:]

PREPARED STATEMENT OF BOB C. MAYER, GENERAL MANAGER, TULSA CONVENTION CENTER, TULSA, OK

Mr. Chairman and members of the Subcommittee:

I. INTRODUCTION

Good Morning. My name is Bob C. Mayer. I am the General Manager of the Tulsa Convention Center in Tulsa, Oklahoma, which is municipally owned and operated by the City of Tulsa. Our facility includes a 9,000 seat sports and entertainment arena, a 100,000 square foot exhibit hall, a 20,000 square foot conference hall, a ballroom, and fourteen meeting rooms. Our facility has hosted a variety of events from Ringling Bros. and Barnum & Bailey Circus, to wedding receptions, banquets, hockey games, basketball games, and major national conventions such as the National Governors' Association Annual Meeting which was held in Tulsa last summer.

I have been associated with the public assembly facility management industry for the past twenty-years in Oklahoma City and Tulsa. In addition, I am the Immediate Past President of the International Association of Auditorium Managers (IAAM), which represents over 1,250 public assembly facility managers throughout the United States. My testimony today is on behalf of the City of Tulsa but also represents the feelings of many of my colleagues in the industry.

Mr. Chairman, before I begin, and on behalf of Mayor Susan Savage and the City of Tulsa, I would like to thank you and the other Subcommittee members for examining the impact of the Federal Copyright Act of 1976 upon state and local authorities and for this opportunity to testify regarding the effect of such Copyright Legislation on public assembly facilities in the United States. Because we play an important and unique role within our respective local communities, it is important that

Congress understands how current Copyright Legislation impacts the operations of our industry and the people we serve back home.

To be concise, we feel that existing Copyright Legislation makes public assembly facility managers and their state or local governmental employers potential defendants in copyright infringement cases due to the legal concept of vicarious liability. As you know, vicarious liability is the imposition of liability on parties who have done no wrong, but who are perceived as being tangentially responsible for a wrongful act. The Federal Copyright Act provides authors and composers with fundamental protection against copyright infringement and we as an organization and an industry are not opposed to such protection. In fact, it is vital for authors and composers to be well compensated for their works if our society is to benefit from the diversity of entertainment we all enjoy. It is our belief, however, that those who promote, perform, and cause recorded music to be played during an event should bare sole responsibility for payment of copyright license fees, unless the public assembly facility is, indeed the promoter or co-promoter of the event.

To explain that belief, my testimony will first examine the nature of the public assembly facility management industry -- the public we serve, the events we house, and types of facilities we use. I will then explain why we are of the opinion that current Copyright Legislation places an undue burden on public assembly facility managers and the communities we serve. Finally, it must be noted that many of the examples used in my testimony are drawn upon my own experiences. However, based on my considerable experience in the industry and numerous conversations with my colleagues, I can assure you that the principles and problems are applicable to similar publicly owned public assembly facilities in other cities and states.

II. THE NATURE OF THE PUBLIC ASSEMBLY FACILITY MANAGEMENT INDUSTRY

A. In General

In the United States, virtually every city has at least one public assembly facility which, for the purposes of this discussion, is defined as an arena, a stadium, an auditorium, a performing arts theatre, an exhibition hall, a conference center and other similar facilities where the public might gather. There are over 1,250 such facilities located throughout the country. Seating capacities for such venues can range from less than 100 to over 100,000.

During a given year, these facilities serve their respective communities at large by providing a forum for business and political conventions, trade shows, and professional examinations. In addition, they house a wide variety of entertainment and sporting events, which appeal to almost every age group and social stratum. These events include: professional and amateur sporting events; jazz, classical, rock, and country music concerts; and such forms of family entertainment as circuses, fairs, plays, musicals, and novelty acts like the Harlem Globetrotters.

B. Public Assembly Use

Management of public assembly facilities is complex and challenging. Because of varying rules, regulations, policies and local ordinances, some such facilities are able to fully promote or co-promote events in their communities. Managers of public assembly facilities who can promote or co-promote events should not be exempt from compliance with Copyright Legislation since, by the very nature of promotion, they share in the profits (and occasionally losses) of the production.

Others facility managers are restricted to renting the facilities to outside promoters and event organizers and providing, for a fee, related services to make the

outcome of the event presentation as successful as possible. Public assembly facility rental arrangements in this instance will range from a flat rental fee to a minimum rental guarantee plus a percentage of any ticket sales. In either case the facility and the state, county, or local owners and operators of the facility do not participate in the risk of presenting the event. It is this type of rental arrangement and facility operation which should be exempt from the doctrine of vicarious liability as it relates to existing Copyright Legislation.

C. Event Types

As was explained earlier, the nature of public assembly facilities is such that an incredible variety of events take place in them. Most professional promoters, performers, sporting organizations and meeting managers realize the importance of paying copyright license fees and pay such as a standard practice. Other event presenters either do not realize their responsibility under Copyright Legislation or do not feel that it is important enough for them to bother with, in spite of attempts by public assembly facility managers to remind them of their obligations. Examples of these types of event presenters include individuals planning a wedding reception; civic organizations planning a dinner and dance; or non-profit associations setting the stage for a "fund raiser." The events may or may not contain any copyrighted music. Typically the public assembly facility manager would not know because he/she is not involved in every facet and detail of each event presented in the facility. For example, if an individual signs an agreement to hold a wedding reception it is unlikely that the facility manager will know whether or not any music is being played at all, let alone which specific tunes are being presented.

In most cases, public assembly facilities in concert with attorneys in the local jurisdictions, will have provided for appropriate contractual language assuring that all copyrighted music will be played with the permission of the copyright owner, that they will pay all obligations under the copyright license, and that they will hold harmless and indemnify the facility and its employees. Unfortunately, in spite of the best efforts of the public assembly facility manager to inform the event organizer of their responsibilities

under the Copyright Law, he/she and the state or local authority could still be at risk of copyright infringement liability.

III. CONCLUSION

Mr. Chairman, we feel that a provision should be considered by the Intellectual Property and Judicial Administration Subcommittee that would overturn the doctrine of vicarious liability under the current Copyright Legislation specifically for publicly owned public assembly facilities. Further, it would be appropriate to include a proviso which would only exempt publicly owned public assembly facilities if they informed their tenants that they, indeed, have certain responsibilities in accordance with the Federal Copyright Act of 1976.

We are pleased that this Subcommittee is examining the effects of the Federal Copyright Act of 1976 on states, counties, and municipalities and hope that the insight presented by this testimony will be helpful to your deliberations.

Mr. Chairman, on behalf of the City of Tulsa, Oklahoma and my colleagues who manage public assembly facilities, it has been a pleasure to testify before you today. Once again, thank you for this opportunity to bring to light some of our concern relative to current Copyright Legislation. I would be happy to answer any questions that you or the other Subcommittee members might have regarding this issue.

Mr. HUGHES. Mr. Swinburn.

STATEMENT OF JOHN S. SWINBURN, EXECUTIVE DIRECTOR, INTERNATIONAL ASSOCIATION OF AUDITORIUM MANAGERS (IAAM)

Mr. SWINBURN. Good morning. My name is John Swinburn. I'm here in my capacity as executive director of the International Association of Auditorium Managers, which is a professional association of managers of public assembly facilities.

Those facilities include, as Mr. Mayer mentioned, convention centers, arenas, auditoriums, amphitheaters, performing art centers and other such places of public assembly.

The members of our association a wide variety of events in the facilities they manage, ranging from professional amateur baseball, hockey and football games, to conventions and trade shows, to weddings, to concerts, and symphony performances. In many cases, music is played in connection with those events, at the direction of the organizers or promoters of the events.

While the members of IAAM strongly believe that the authors and composers of musical works should be fairly compensated for their efforts, we believe public assembly facility managers, and the facilities they manage, should not be exposed to liability of the illegal actions of short-term facility users. That is, users who fail to pay for music licensing fees.

I want to thank you for the opportunity to appear before you today to discuss these issues. My testimony today will first address our position that the obligation for paying music licensing fees should, in every instance, be performed by the individuals or organizations that cause copyrighted music to be played or performed.

I will then review our position that the doctrine of vicarious liability, as applied to public assembly facilities in connection with copyright infringement, is unjust and unfair.

Finally, I will review some of the arguments that have been made with regard to facilities' responsibilities and IAAM's arguments to counter those positions.

It is our position that the person or organization responsible for causing music to be played or performed in an event in a public assembly facility should bear full responsibility for paying the appropriate music licensing fees associated with the event.

For example, if a concert promoter organizes a rock concert during which copyrighted music is played, the promoter should be responsible for paying music licensing fees. Neither the facility nor its management can be expected to control what music is played, and should not therefore be expected to take responsibility for it.

Only the promoter can control the event and should therefore assume musical licensing liability. Our position is based on what we believe is fair and equitable.

Under the present law, the facility is unfairly placed in the position of being an enforcer. That is, the facility must attempt to ensure that the promoter of an event pays all appropriate musical licensing fees. If not, the facility is expected to pay.

We believe the music licensing organizations should develop mechanisms to ensure that users of music are aware of and comply with copyright laws. We do not believe the administrative burden

and administrative costs of compliance should be placed on the facility in which the music is played.

The argument has been made that public assembly facilities receive rent from facility users who play copyrighted music, and, therefore, the facility should bear the burden of paying licensing fees. That argument and the logic upon which it is based is unsound.

Facilities are renting space. They should not and can not bear responsibility for every activity that takes place in that space. We are aware of the arguments made by musical licensing organizations that the transient nature of facility users makes it difficult for the licensing organizations to track them and determine whether the appropriate fees have been paid.

While we appreciate that the tracking of facility users may be difficult, we believe that difficulty does not justify placing facilities in the position of absorbing liability.

Finally, we are aware of the argument that many facility users may not fully comprehend their obligations under the law and that, therefore, facilities should take on the burden of compliance.

We disagree, but would acknowledge the facility contract should clearly state that users have responsibilities under the copyright laws. We do not take the position that facilities should be relieved of responsibility for paying musical licensing fees in every instance.

If, as Mr. Mayer pointed out, a facility stands to profit by serving as a promoter or copromoter and by taking a financial risk on an event on which copyrighted music is played, the facility should bear or share responsibility for music licensing fees.

However, a facility should not bear responsibility if the facility simply rents space and has no control over an event's content.

To put the matter in perspective and to cast it in another light, let me pose a hypothetical example of a similar tenant/landlord relationship and pose a rhetorical question of whether the landlord would be or should be liable.

An apartment building manager leases an apartment to a tenant who, without the manager's knowledge, illegally duplicates copyrighted music from a cassette tape. Is it just, logical, reasonable, or moral to hold the manager vicariously liable for the actions of the tenant? We think not.

We believe the vicarious liability to which facilities are exposed under the present law is equally as unjust and illogical. Our position is this. Facilities which promote or copromote events at which copyrighted music is played should bear full or partial responsibility for paying musical licensing fees.

However, facilities which do not play a part in organizing an event should not bear responsibility for the actions of the event's organizers or participants.

Mr. Chairman, we encourage the Subcommittee on Intellectual Property and Judicial Administration to consider the proposed amendment to the Copyright Act which we have put forward for your consideration.

This proposed language, if enacted, would contravene the doctrine of the vicarious liability in connection with copyrighted music in public assembly facilities.

We again wish to express our appreciation to you and the other members of the subcommittee for assessing the impact of copyrighted legislation on public assembly facilities. And on behalf of the International Association of Auditorium Managers and the 2,000 persons and organizations it represents, it has been a pleasure to testify before you today.

Of course I will be glad to answer any questions, if you have any. Thank you.

Mr. HUGHES. Thank you.

[The prepared statement of Mr. Swinburn follows:]

PREPARED STATEMENT OF JOHN S. SWINBURN, EXECUTIVE DIRECTOR, INTERNATIONAL ASSOCIATION OF AUDITORIUM MANAGERS (IAAM)

The Honorable William J. Hughes and members of the Subcommittee:

INTRODUCTION

Good morning. My name is John S. Swinburn, I am here in my capacity as Executive Director of the International Association of Auditorium Managers (IAAM), a professional association of managers of public assembly facilities. Those facilities include convention centers, arenas, auditoriums, stadiums, amphitheaters, performing arts centers, and other such places of public assembly. The members of our Association host a wide variety of events in the facilities they manage, ranging from professional and amateur baseball and football games to conventions and tradeshows to weddings to hockey games to concerts and symphony performances. The membership of IAAM numbers more than 2,000 individuals and firms, representing more than 900 public assembly facilities and more than 300 companies and organizations which provide products and services to public assembly facilities. Included among those 300 companies and organizations are BMI and SESAC, two music-licensing organizations. While we strongly believe that the authors and composers of musical works should be fairly compensated for their efforts, we believe public assembly facility managers and the facilities they manage should not be exposed to liability for the illegal actions of short-term facility users.

Mr. Chairman, I want to extend IAAM's appreciation for your efforts to honestly evaluate the impact of the Federal Copyright Act of 1976 on public

assembly facilities and I thank you for this opportunity to testify in that regard. Managers of public assembly facilities and the communities they serve applaud your efforts to ensure that copyright legislation, specifically as it applies to music protected by copyrights, accomplishes its intent in a manner that is fair to all parties.

My testimony today will first address our position that the obligation for paying music licensing fees should, in every instance, be borne by the individuals or organizations that cause copyrighted music to be played or performed. I will then review our position that the doctrine of vicarious liability as applied to public assembly facilities in connection with copyright infringement is unjust and unfair. Finally, I will review some of the arguments that have been made with regard to facilities' responsibilities and IAAM's arguments to counter those positions.

LIABILITY FOR MUSIC LICENSING

Liability for Music Licensing Fees Should be Borne by Persons/Organizations Causing Music to be Played or Performed

It is our position that the person or organization responsible for causing music to be played or performed at an event in a public assembly facility should bear full responsibility for paying the appropriate music licensing fees associated with the event. For example, if an exhibitor at a tradeshow plays music from its booth, the exhibitor should have responsibility for paying the fees; neither the facility manager nor the trade show organizer can effectively control the

exhibitor's actions, so the exhibitor should be expected to accept full liability. Similarly, if a concert promoter organizes a rock concert during which copyrighted music is played, the promoter should be responsible for paying music-licensing fees. Neither the facility nor its management can be expected to control what music is played and should not, therefore, be expected to take responsibility for it. Only the promoter can control the event and should, therefore, assume music-licensing liability.

Our position is based on what is fair and equitable. Under the present law, the facility is unfairly placed in the position of being an enforcer . That is, the facility must attempt to ensure that the promoter of an event pays all appropriate music-licensing fees; if not, the facility is expected to pay.

Vicarious Liability is an Unreasonable Burden

Public assembly facility managers, represented by IAAM, have long believed that their potential exposure to liability for copyright infringements by users of the facilities they manage is unjust and inappropriate. The copyright statute in its present form transfers liability for copyright infringement to the facility through the doctrine of vicarious liability. That is, a person or organization who rents or leases a facility may cause music to be played, yet the facility is placed in the tenuous position of having ultimate responsibility for paying music licensing fees. We believe the music licensing organizations should develop mechanisms to ensure that users of music are aware of and comply with copyright laws; we believe that individuals and organizations that choose to play

copyrighted music should pay a fair compensation for the benefits they gain by playing copyrighted music. We do not believe the administrative burden and administrative costs of compliance should be placed on the facility in which music is played.

It has been argued that public assembly facilities are the appropriate parties to hold responsible for paying music licensing fees for copyrighted music held in their facilities. The argument has been that public assembly facilities receive rent from facility users who play copyrighted music and, therefore, the facilities should bear the burden of paying licensing fees. That argument, and logic is unsound. Facilities are renting space; they should not and cannot bear responsibility for every activity that takes place in that space. It is our view that the law as it is written and applied in practice treats facilities as the revenue stream of last resort. If facility users do not pay music licensing fees, then the facilities themselves are approached with the expectation that they will pay those fees.

We are aware of the arguments made by music-licensing organizations, that the transient nature of facility users makes it difficult for the licensing organizations to track them and to determine whether the appropriate fees have been paid. While we appreciate that the tracking of facility users may be difficult, we believe that difficulty does not justify placing facilities in the position of absorbing liability. We are aware, too, that music-licensing organizations view facilities as "enforcers" of the copyright law; that is, facilities are expected to

demand that users pay the appropriate music licensing fees but, if users fail to heed the facilities' demands, the facility is the revenue stream of last resort. Finally, we are aware of the argument that many facility users may not fully comprehend their obligations under the law and that, therefore, facilities should take on the burden of compliance -- we disagree, but would acknowledge that facility contracts should clearly state that users have responsibilities under the copyright laws.

In industry practice, if a facility serves as a promoter or co-promoter the facility takes a financial risk on an event in order to generate revenue; the facility might make money on such an event or it might lose money on it. Therefore, if a facility stands to profit by taking a financial risk on an event at which copyrighted music is placed, the facility should bear or share responsibility for music licensing fees. I reiterate, though, that a facility should not bear responsibility under the doctrine of vicarious liability if the facility simply rents space and has no control over an event's content.

To put the matter in perspective and to cast it in another light, let me pose a hypothetical example of a similar tenant-landlord relationship and pose the rhetorical question of whether the landlord would be or should be liable.

An apartment building manager leases an apartment to a tenant who -- without the manager's knowledge -- illegally duplicates copyrighted music from a cassette tape. Is it just, logical, reasonable, or moral to hold the manager vicarious liability for the actions of the tenant? We think not. And we believe the

vicarious liability to which facilities are exposed under the present law is equally as unjust and illogical.

Our position is this: facilities which promote or co-promote events at which copyrighted music is played should bear full or partial responsibility for paying music licensing fees. However, facilities which do not play a part in promoting an event should not bear responsibility for the actions of the event's organizers or participants.

CONCLUSION

Mr. Chairman, we encourage the Subcommittee on Intellectual Property and Judicial Administration to consider the attached amendment to the Copyright Act. This proposed language, if enacted, would contravene the doctrine of vicarious liability in connection with copyrighted music in public assembly facilities.

We again wish to express our appreciation to you and the other members of this Subcommittee for assessing the impact of copyright legislation on public assembly facilities.

On behalf of the International Association of Auditorium Managers and the 2,000 persons and organizations it represents, it has been a pleasure to testify before you. I will, of course, be glad to answer any questions you may have regarding my testimony.

103D CONGRESS
1ST SESSION

H. R. _____

To amend the Copyright Act of 1976 . Title 17 U.S.C. Section 110 to exempt public facilities from the doctrine vicarious liability under the Federal Copyright Act Title 17 of the U.S. Code.

IN THE HOUSE OF REPRESENTATIVES

February ___, 1994

A BILL

To exempt Public Assembly Facilities from the doctrine of vicarious liability and other related third party liability doctrines under the Copyright Act of 1976, as amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

(a) Definitions - The below definition "public assembly facility" is hereby inserted in the definition Section of 17

5 U.S.C. Section 101.

"Public assembly facility" shall mean a facility that draws groups of people for the purposes of business, entertainment sporting events and civic and community activities. Examples of a "public assembly facility" shall include but not be limited to auditoriums, arenas, stadiums, convention centers, exhibition halls, civic centers, theaters and amphitheaters.

(b) Exemptions - The below new Subsection (11) is inserted at the end of 17 U.S.C. Section 110.

(11) performance of a non dramatic musical work by a concessionaire, lessee, promoter or other person at a public assembly facility shall not extend any liability for copyright infringement on the public assembly facility, that would be imposed, under the doctrine of vicarious liability or related infringement, but shall not excuse any such concessionaire, lessee, promoter or other person from infringement liability for the performance.

Mr. HUGHES. Mr. Jacobs, welcome.

STATEMENT OF JERALD JACOBS, ATTORNEY AT LAW, ON BEHALF OF THE AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES (ASAE)

Mr. JACOBS. Thank you, Mr. Chairman, good morning. The American Society of Association Executives appreciates the opportunity to present its views this morning to the subcommittee on the activities of the performing rights societies regarding music licensing.

I would hope that the chairman would permit a passing comment to the fact that our testimony this morning, and that of most witnesses here, is presented under a provision of the budget bill passed by Congress last year, which may tax us at a 35-percent flat rate for the costs of presenting this testimony for the assistance of Congress in undertaking its congressional responsibilities. We hope that matter will be revisited by the Congress soon.

Mr. HUGHES. Your exception is noted.

Mr. JACOBS. The American Society of Association Executives represents over 22,000 executives who manage trade and professional associations at the National, State, and local levels. ASAE regards itself as essentially the champion of joint lawful activity in the United States, a truly unique cultural influence in this country. It is one that was commented on long ago by De Toqueville, who expressed wonderment at how Americans get together for virtually any joint and useful purpose.

We recognize and applaud the existence and the activities of the performing rights societies in providing a mechanism for owners of copyrights in music, including the separate performance rights for copyrighted music, to be able to collect royalties for their labors at a just and fair rate.

We by no means challenge and attack the existence of the performing rights societies. But we've had some unique experience recently with those performing rights societies, which we hope will be of assistance to the Congress in addressing this issue.

And I note also that in ASAE's communications with its members over the last few years about copyright issues, it has taken great pains to make very clear to the membership, in effect, to educate the association community throughout the United States, about the laws that pertain to performance of copyrighted music at public assemblies. We think that ASAE has actually done a major service to the performing rights societies and especially to music composers and publishers in that regard.

In 1990, ASAE participated in a coalition of organizations that negotiated with ASCAP and BMI separate license forms for use by associations when copyrighted music is used at meetings or events sponsored by associations.

It must be recognized that associations are not entertainment or hospitality organizations. They are very different from nightclubs, restaurants, or even hotels, where music is essentially an important part of the services that are provided.

Associations are educational organizations. They provide business and professional education throughout the United States. The

statistics show that there are over 289 million members of associations, more even than there are Americans, because many Americans belong to more than one association.

Associations are ubiquitous in our society and everybody knows they are there for education. When music is used by associations at meeting events, it is a very incidental aspect of the conducting of association educational meetings.

Nevertheless, ASAE recognized what the law requires, and ASAE participated in the development of copyright license forms for use by associations when meetings are sponsored by associations.

There ensued a most unfortunate period in which ASCAP and BMI in effect set out to engage in separate harassment and intimidation campaigns throughout the association community. They started with communications to thousands of associations claiming that they were granting amnesty to those associations.

For decades, ASCAP and BMI had ignored the meeting industry in terms of music licensing. Then, all of a sudden, they told everybody that they were providing amnesty from the otherwise applicable $20,000 penalties provided in Federal law if the associations would sign these licenses right away. The threat was that if associations didn't sign the licenses right away, they would have to pay $20,000 which this was absurd.

After that campaign failed and many associations were predictably and understandably frustrated and disappointed, ASCAP and BMI set out in the campaigns that continue today to essentially harass and intimidate associations. Many or most of these associations of whom don't use music at all; or, if they use music, they may be more careful to use public domain music at events they sponsor.

Associations, unlike nightclubs, for example, don't need to use copyrighted music at their events. It's very optional for virtually every association.

Nevertheless, ASCAP and BMI representatives presume the use of copyrighted music. They make phone calls and write letters, apparently often using commissioned sales people who are very poorly trained.

Their general pitch has been reported by hundreds of associations. These are not incidental or anecdotal reports. The general pitch of ASCAP or BMI is, "You're using music, we know it, you're cheating the copyright owners, you must sign this document immediately or you will have to pay $20,000." Clearly, this is a simplistic, and in many ways fraudulent, approach in this regard.

The ASCAP consent decree of 1950 specifically prohibits threats of litigation. And yet threats of litigation are made daily against members of the association community.

Another problem has been the offering of music only through a fixed, structured, multiyear, automatically renewable, minimum fee licensing agreement for access to the entire repertories of either ASCAP or BMI.

Associations are incidental users of music. They don't very often need access to an entire repertoire. A good example is a small association in the Midwest that wanted to hire an accordionist as a backup for a reception at the end of its convention. The accordionist quoted a $50 fee to play at this reception. The minimum BMI

fee annually for a 3-year license was $150. That accordionist didn't get the work, and the composers of the music he might have played didn't get any fees, because of the $150 annual minimum fee for one accordionist to play for perhaps an hour at an association-sponsored reception.

They won't license associations for single programs or for a group or a list of titles of music. Equally important, they won't license others in the chain of responsibility.

And we recognize that the courts have found that all who are in the chain of responsibility for an event in which copyrighted music is played bear joint and several responsibility for payment of a single copyright license to the owner.

Associations very rarely will pick a repertory to be used as background music, at a reception at its convention, at a closing dinner dance at its event, or as an introductory theme, such as perhaps dixieland music for a convention in New Orleans, when the opening ceremony is presented and maybe a Member of Congress comes out to give an opening speech. Associations go to talent agencies, or they rely on the hotel or convention center, or they have an event producer that engages the talent and directs what shall be performed. The association often has very little to do with it.

ASCAP will not license the talent agency. It will not license the event producer. It will not license anyone but the association sponsor of music. Why? They say that is just the way they prefer it. They have the music; and if you want to use it, you do it their way. The situation is extremely frustrating for associations.

Another problem that associations have when they get together, such as when they got together in 1990 to negotiate a deal with ASCAP and BMI for standard license forms, is that ASCAP and BMI will not disclose other industrywide arrangements.

These are apparently scores of such arrangements, although we don't know how many they have or what are their terms. If you buy a house, the real estate agent will tell you about comparables in the neighborhood. How else do you have any way of determining what is the value and what is a fair price for what you are proposing to buy?

ASCAP and BMI won't give you comparables. You don't know what other industries are paying for industrywide license forms for copyrighted music. They say that they just prefer not to tell you when you ask them what other industries are paying. And yet both ASCAP and BMI have signed consent decrees in settlement of Federal antitrust cases in which they have agreed to not discriminate on fees for users similarly situated. Only they know if they are discriminating, because there is essentially no way to review their rates, unless you want to go to a rate court in New York and you are dealing with ASCAP.

ASAE has been quoted $250,000 to handle a rate court proceeding in the Southern District of New York. That's what it costs if you want to take on ASCAP over, for example, this issue of comparables and fairness.

The performing rights organizations have often failed to recognize legitimate and appropriate exceptions, whether statutorily introduced or introduced in judicial decrees.

There is, in the 1976 act, a specific provision exempting music used at annual fairs of agricultural organizations. An agricultural nurseryman's organization attempted to use copyrighted music at one of its annual fairs. It is tax exempt under section 501C–5 of the Internal Revenue Code, recognized as an agricultural organization.

ASCAP said, "You have to have a license. We know you are an agricultural organization, but we think Congress really meant 4–H clubs when they passed that exemption."

Nothing in the legislative history suggests that limitation, but they have an unfettered, unregulated ability to, in effect, interpret things any way that they want, because there is no real effective day-to-day oversight over these organizations, no corrective method available against them.

Likewise, ASCAP has brought three lawsuits against organizations that sponsor trade shows or expositions. Their contention is that the sponsoring organizations are responsible for even incidental copyrighted music used by exhibitors at trade shows.

In one case, a trade show had 4 miles of trade show aisles. But there were 4 booths where the use of copyrighted music was found. ASCAP brought a lawsuit against the trade show sponsor, even though the trade show sponsor in no way permitted or condoned the use of that copyrighted music.

And ASCAP wants the trade show sponsor to pay a license fee based upon the thousands of people that come through that trade show, because four out of thousands of exhibitors chose to use copyrighted music.

There is a specific judicial determination in the Second Circuit Federal Appellate Court which holds that a landlord is not responsible for copyrighted music usage of a tenant unless the landlord is somehow involved in approving or encouraging that use.

ASCAP ignores that law. ASCAP says a trade show sponsor which leases space, and then sublets part of it to exhibitors, is not like a landlord. In ASCAP's views, the sponsor should be paying because it is a bigger organization and has more money. This is really an abuse that is unconscionable.

The performing rights organizations refuse to provide those who purchase their licenses, or want to purchase their licenses, with online computer access to the current titles in their repertories.

They are selling a pig in a poke. You don't know what titles you are buying from ASCAP and BMI. Therefore, you have to buy both an ASCAP and a BMI license. They tell you that they have millions of titles and they are changing instantly, and by the time they printed out a list of their titles the list would be obsolete.

You and I can walk onto almost any street corner and get money out of a computer machine, but ASCAP and BMI together, I note, each and both, refuse to provide computer access.

So an organization that has only incidental use of music, like a trade association or a professional society, could decide to purchase one or the other repertories, not both, and could limit its incidental use of music to those titles that are just in their repertory of the organization from which is bought a license.

Because the repertories are not available in this day of ubiquitous use of computers, because they are not available, you are

simply forced to buy both repertories, doubling your cost. It strikes us as absolutely unconscionable. And again there is no one there telling them that access is fair, that this is right, that this is appropriate.

They don't want to do it. It benefits both, so they refuse to put their repertories online. And if they do it, it ought to be free. It ought to be readily accessible to any purchaser, through Compuserve or any other kind of a service. This just seems real basic.

Mr. HUGHES. Can you conclude in the next minute, Mr. Jacobs?

Mr. JACOBS. Yes sir.

The organizations appear, such as in that instance, to coordinate their activities. Their industrywide contracts and licenses are fairly similar in many instances, although they are negotiated separately. Somehow they end up looking very much alike.

Ultimately, there is no Federal oversight except this subcommittee. ASCAP really hasn't been looked at since 1950, when Harry S. Truman was President of the United States.

We strongly believe that there should be some mechanism, some control—and we don't have a specific legislative proposal—not to limit or prohibit the performing rights societies but to bring some fairness, some appropriateness, some oversight, from an objective body to their excessive practices.

Thank you.

Mr. HUGHES. Thank you, Mr. Jacobs.

[The prepared statement of Mr. Jacobs follows:]

Prepared Statement of Jerald Jacobs, Attorney at Law, on Behalf of the American Society of Association Executives (ASAE)

Mr. Chairman and Members of the Subcommittee, the American Society of Association Executives is pleased to have the opportunity to provide its comments on the issue being considered by the Subcommittee -- Music Licensing Practices of the Performing Rights Societies. ASAE and its members have had quite extensive and fairly recent experiences with the performing rights societies on music licensing issues; and we trust that what has been learned from those experiences will be helpful to the Subcommittee in its consideration of this subject.

ASAE and Its Membership

The American Society of Association Executives has over 22,000 members who serve as employed executive staff of trade associations, professional societies and other nonprofit organizations at the national, state and local levels. ASAE and the 10,000 voluntary associations managed by ASAE's members are primarily educational organizations; by far the most pervasive and consistent function of associations is education. Associations educate their members through meetings, seminars, conventions and expositions; through publication of journals, magazines, newsletters and manuals; and through networking opportunities created whenever volunteers assemble for association programs or activities. Associations also educate government by providing broad-based comments and research on issued pending before legislative, administrative

and judicial branches of government -- often with associations' input made at the specific invitation and request of government officials. Finally, associations educate the general public through publications, press releases and other communications of interest beyond the associations' specific memberships.

ASAE and Music Licensing

Throughout the history of association endeavor in the United States and up until the late 1980's, associations had been largely unaware of the issue of licensing of copyrighted music through performing rights societies or otherwise. The Copyright Act of 1909 had placed a qualification on the performance rights protected under the law to those performances made "for profit"; even after that broad qualification was repealed and replaced in the Copyright Act of 1976 by several specific exemptions, there was no rush by copyright owners or by performing rights societies to obtain licenses from the nonprofit community, at least that segment of it composed of associations. It was assumed that the performing rights societies had simply chosen to ignore the association community because of the minimal and sporadic use of copyrighted music by associations, which exist primarily to provide education.

In the late 1980's, ASAE was approached by one or both of the principal performing rights societies, the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) regarding music usage by associations and development of a possible association-wide music licensing form. It was ASAE's impression that music usage by associations was minimal and did not justify the time and expense of creating special forms for associations only. It was also widely assumed at the time that music licensing had already been arranged by hotels, convention centers and conference centers, where the majority of association-sponsored events that might include the incidental use of music were typically scheduled.

In 1990, after other entities representing meeting professionals had begun communications with ASCAP and BMI toward a possible association-community music licensing form, ASAE accepted an invitation from those entities to join a coalition effort in that regard. The coalition became the Music Licensing Task Force. The Task Force negotiated separately with ASCAP and BMI toward a specific music licensing form for use by associations. The negotiations were concluded and the new forms were distributed by ASCAP and BMI throughout the association and meeting planning fields in late 1990 and early 1991.

ASAE's Commitment to Respecting Copyright Ownership

Before and after the negotiations with ASCAP and BMI of association music licensing forms, ASAE has remained committed to respecting the copyright ownership and performance rights of those who create original musical compositions. All statements ever issued by ASAE to its membership regarding music licensing have carefully pointed out that federal copyright law grants performance rights to music used at association-sponsored events in some circumstances and that associations who ignore or violate the law can be subject to substantial penalties. ASAE and virtually all of its members are extensively engaged in publishing endeavors; associations value their own copyright protection for use of written works and they respect, and urge members to respect, the similar copyright protection afforded in the law for the performance of musical works. In short, ASAE does not, and would not, dispute or demean the rights of owners of copyrighted music to receive fair compensation for live or recorded performances of their works. ASAE has only taken issue with some of the ways that agents of copyright owners, the performing rights societies, have gone about obtaining that compensation.

ASCAP and BMI Practices

Virtually from the beginning of circulation of the standard music licensing forms by ASCAP and BMI to associations, there have been extensive problems evident in ASCAP and BMI practices.

The word "exploit" is a common term of art in intellectual property law. Owners or assignees of copyrights and other rights afforded by law to created works are permitted to "exploit" the protected works by licensing the use of them to others. By comparison, ASCAP's and BMI's implementation of music licensing forms in the association community can fairly be characterized by the more conventional definition of "exploitation". Their practices have been the subject of hundreds of complaints to ASAE from associations that have dealt with the performing rights societies. While ASAE itself and presumably many ASAE members have signed the licenses and paid the royalties called for by the forms, we are also aware that many associations have chosen instead to completely avoid the use of copyrighted music at events that the associations sponsor. This is counter-productive to the interests of music copyright owners who have assigned performance rights to ASCAP and BMI; it is also not necessarily in the best interests of association meeting planners who might otherwise make use of music at association events if use of the music did not entail having to deal with ASCAP and BMI.

The following are summaries of some of the more serious problems that have arisen in the course of the association community's dealings with ASCAP and BMI. Note that this list attempts to avoid many of the problems which are inherent in the specific music licensing forms negotiated in 1990 by the Music Licensing Task Force. Instead, the focus is on the more severe anti-competitive infirmities that seem to be systemic in the practices of the performing rights societies and may be of interest to this Subcommittee.

Harassment and Intimidation Tactics

ASCAP's and BMI's attempts to enlist signatories to their music license agreement forms have included tactics that offend association professionals and were counter-productive to the widespread use of copyrighted music.

Initially the performing rights societies communicated with thousands of associations, whether the associations were in the habit of using copyrighted music at their events or not, and offered "amnesty" from prosecution for past infringements of music copyrights if the associations would immediately sign the ASCAP and BMI agreements. To most association executives, this suggested that ASCAP and BMI regarded them as the equivalent of draft dodgers or tax evaders. In fact, there had been essentially no attempts before that time by ASCAP and BMI to enforce music copyrights in the association community. The performing rights societies were seen as accusing associations of "crimes" that most had never heard of, based upon activities that many had never engaged in; the approach resulted in resentment and antagonism.

After these ill-fated initial attempts, ASCAP and BMI settled into an approach that persists still. While it takes various shapes, it always consists of three elements: (1) accuse the association of copyright infringement without knowledge of whether the association has ever used copyrighted music, (2) threaten to immediately impose the statutory maximum fine of $20,000, and (3) demand immediate signing of the music license forms. At least one of the performing rights societies apparently engaged untrained commissioned field sales staff, who routinely used offensive language in communicating with association executives. The presumption is always that the association is infringing upon copyrights, lying about its copyrighted music usage, and unwilling to pay its just obligations. No attempt is ever made to describe the practical alternatives to signing the music license forms, or even to acknowledge that alternatives exist (i.e., no music, public domain music, statutory and judicial exceptions, etc.).

These tactics are more than just bad salesmanship. They are illegal. ASCAP has specifically agreed in a consent decree settling a federal antitrust challenge to avoid threatening litigation [U.S. v. ASCAP, 1950-51 Trade Cases (CCH) ¶ 62,595 (S.D.N.Y 1950) § IV(F)(2)]. And both performing rights societies

violate federal and state laws against fraud when they use false accusations to induce the signing of licensing contracts.

Blanket Licenses Only

Another serious anti-competitive problem with the ASCAP and BMI endeavors is that they have chosen only one method to make music licenses available to associations -- through inflexible, multi-year, automatically-renewable, minimum-fee, full-repertory "blanket" licenses. In short, each performing rights society will only "sell" access to its entire repertory of music; associations cannot license a particular song or list of songs for one-time use at a specific event. They must instead agree to buy three or four years' access to millions of music titles, the vast majority of which are not needed or wanted.

In 1992 one typical ASAE member, for example, wanted to use an accordionist to provide background music for a reception. The accordionist quoted a fee of $50 to play at the reception, the only event that year at which the association planned to use music. BMI demanded its minimum annual fee of $150 -- three times that of the musician -- for access to the entire BMI repertory. The association did not need or want access to the whole repertory for a full year. But BMI would offer nothing else. The accordionist was cancelled; neither he, nor BMI, nor BMI's copyright owners benefitted.

The performing rights societies routinely refuse to interpret or amend their blanket license forms when requested by individual associations; the pitch is not even "Take it or leave it" but more often just "Take it". They claim that the anti-discrimination features of their antitrust consent decrees prohibit interpretations or amendments; but there is documented evidence that a special deal or modification to the standard association music licensing form will occasionally be made.

"Blanket" licenses may be reasonable in other fields, particularly for hospitality or entertainment businesses where regular use of a wide variety of music is expected. But associations are not in the hospitality or entertainment businesses; they engage primarily in education. Many or most associations use no music at all. Those that do use music virtually all limit it to convention opening sessions, background music at receptions, or convention closing dinner-dances. These uses are clearly incidental to the main purposes and activities of associations. They do not reasonably require access to the millions of titles in the ASCAP or BMI repertory.

It is, however, in the performing rights societies' best interests to license access to their entire repertories at one time. They can justify higher charges than they could for the one-time license to only one or a few titles.

ASCAP uses questionable logic to argue that its consent decree prohibits licensing of less than its whole repertory. BMI's consent decree appears to affirmatively require program licenses, but BMI refuses to offer them [U.S. v. BMI, 1966 Trade Cases (CCH) ¶ 71,941 (S.D.N.Y 1966) § IX(C)].

Arbitrary Selection of Licensees

Another serious anti-competitive problem is the parallel conduct of ASCAP and BMI in arbitrarily determining that only associations may sign copyright licensing agreements for music used at association-sponsored events. The performing rights societies refuse to license others who are also legally responsible for copyright royalties and ordinarily far better situated to obtain the licenses.

It is clear in the law that all who sponsor meetings using copyrighted music, all who arrange for the music or the musicians, and all who actually perform the music are equally ("jointly and severally") responsible to see that licenses have been obtained and royalties paid.

An association executive who might decide that a planned association-sponsored event could be enhanced with the use of musical accompaniment or background will rarely actually engage musicians and dictate programs. These arrangements are more often made by or on the recommendations of booking agents, hotel or convention center personnel, event producers or by others who assist in making meeting arrangements. Each of these entities is better situated than the associations to obtain music licenses. And many would much prefer to offer music licensing as one of their services. But ASCAP and BMI steadfastly refuse to license anyone other than the association.

In one bizarre circumstance, an event production firm that was engaged to organize and present a large event as part of a meeting attempted repeatedly to purchase a music license from one of the performing rights societies; the production firm's checks were repeatedly rejected by the organization. Ultimately the production firm escrowed the funds and notified the performing rights society that the funds were available upon their request.

Secret Agreements

ASCAP and BMI refuse to disclose the terms of industry-wide music licensing agreement forms. Therefore, music users are at a competitive disadvantage -- they have no effective way to measure the fairness of license fees proposed by the performing rights societies. There is no check or control on the performing rights societies' discretion to charge essentially any amount. In

virtually every field of business, comparables are used to determine price and value; here comparables are simply not available because ASCAP and BMI choose to keep them secret.

In one situation, which is now the subject of antitrust litigation, ASCAP and BMI negotiated industry-wide license agreements with an umbrella organization for music used at custom car shows affiliated with the umbrella organization. Later, when ASCAP concluded its negotiations with the Music Licensing Task Force, the custom car show license was cancelled and the shows were forced to use the new association form, allegedly raising the shows' license fees many times. The custom car show umbrella organization accuses ASCAP and BMI (as well as ASAE and others) of conspiring to raise its music licensing fees. But clearly the Music Licensing Task Force was placed at a disadvantage in its negotiations with ASCAP and BMI because it was not aware of this existing arrangement with the custom car show organization.

ASCAP and BMI have agreed in consent decree settlements of older antitrust suits that they would not discriminate in licensing fees charged to comparable users [U.S. v. ASCAP, § IV(c); U.S. v. BMI, § VIII]. The consent decrees are not subject to private enforcement.

Exceptions

ASCAP and BMI refuse to recognize and accept statutory and judicial exceptions to the obligation to pay music licensing royalties.

For example, the Copyright Act of 1976 exempts from copyright infringement liability the "performance of a nondramatic musical work by a governmental body or a nonprofit agricultural or horticultural organization, in the course of an annual agricultural or horticultural fair or exhibition conducted by such body" [§ 110(6)]. In one instance a performing rights society refused to recognize the exemption of a nonprofit nursery association, tax-exempt as an agricultural organization [§ 501(c)(5)] of the Internal Revenue Code], because, it alleged, the nursery association did not resemble the 4H groups that it believed the § 110(6) exemption addressed.

In another area, with even broader ramifications for the association community, ASCAP and BMI both continue to demand music licenses from associations and others that sponsor trade shows when copyrighted music may incidentally be used by exhibitors at the shows and the sponsors do not sanction, assist, or even know about the music usage of exhibitors. ASCAP has brought three lawsuits to enforce music licensing in this situation. The suits are pending. Sponsors of trade shows are essentially "landlords" that sign "leases" with exhibitors for use of trade show booths; judicial precedent makes clear that

vicarious liability cannot be used to hold the landlord liable for music copyright infringement by a tenant [Shapiro, Bernstein & Co. v. H.L. Green Company, 316 F.2d 304 (2d Cir. 1963)]. ASCAP and BMI both choose not to license trade show exhibitors, preferring again to force the purchase of a license for an entire trade show by its sponsor even if only one or a few exhibitors use copyrighted music in their booths.

On-Line Access to Repertories

One of the most patently anti-competitive of all of ASCAP's and BMI's practices is their continuing refusal to make available through some free on-line computer service the lists of the titles in the repertories of the performing rights societies. Users of copyrighted music are effectively compelled to purchase access to both the ASCAP and BMI repertories because they cannot determine what titles are in each. For associations, this effectively and unnecessarily doubles the cost of music licenses. If the repertories were readily available, incidental users of copyrighted music such as most association users could simply require that live performances or recordings used at association-sponsored events conform to the repertory of the performing rights organization that has been licensed (i.e., either ASCAP or BMI). Since this cannot be done, the association if forced to "buy" both repertories. Even after "buying" both, there is no good way to assure that music usage does not violate copyrights of other, smaller performing rights societies (for example, SESAC).

ASCAP and BMI will both give "yes" or "no" answers in response to inquiries about whether specific titles are in their repertories. But this is obviously insufficient to permit associations to design their own music programs around one or the other repertory.

In this age of ubiquitous use of computers, there is simply no excuse for ASCAP's and BMI's joint unwillingness to let music users see what they are paying for by providing free, on-line access to their repertories. Once again, their failure to do so suggests anti-competitive motives.

Coordination by ASCAP/BMI

ASCAP and BMI claim to operate independently of one another; but there is evidence suggesting otherwise. Agreements negotiated by ASCAP and BMI often bear remarkable similarity. Equally telling is the parallel conduct of the two organizations. They do not compete with one another in any significant and conventional way. Both use sales tactics that presume infringement by associations and refuse to acknowledge legitimate exemptions. Where one has

a purported antitrust consent decree limitation, both apparently observe it (i.e., unavailability of program licenses for associations). Both refuse to make available on-line access to repertories which would permit some modest users of music such as associations to choose to deal with either ASCAP or BMI but not both.

In short, ASCAP and BMI enjoy a Congressionally-sanctioned and virtually-unregulated shared monopoly for the music licenses that they offer. The monopoly has been so longstanding, and has been so free from objective scrutiny and control, that it has lapsed into the kind of conduct that economists expect from monopolies -- a pattern of inflexibility in service, lack of concern for the "customer" (the music user) and a paramount drive to preserve the monopoly.

No Oversight

There exists no efficient and effective recourse for dispute resolution in the area of music licensing by the performing rights societies. There is no practicable brake on abuses and excesses. In 1992 ASAE raised virtually all of these issues in letters to both ASCAP and BMI. Despite repeated re-submissions to assure receipt by ASCAP, that society has still not responded to ASAE. BMI responded by refuting some issues and ignoring most of them. ASAE made a submission to the Antitrust Division of the U.S. Department of Justice in 1992 in which it outlined and documented numerous apparent violations of the ASCAP and BMI consent decrees; we met with Justice Department officials and provided requested additional documentation. The officials informally acknowledged that consent decree violations may have occurred but emphasized that enforcement of the performing rights societies' consent decrees is a very low priority for the federal government. No formal response was ever provided to ASAE.

For those who fail to concur with ASCAP or BMI regarding the terms of music license agreement forms, there is a rate court proceeding available in the United States District Court for the Southern District of New York. A reputable law firm experienced in music copyright rate court proceedings has indicated that legal fees are typically in the range of $250,000, obviously an exorbitant amount for smaller and incidental users of music such as associations. For disputes with BMI, the only recourse is to arbitration, which must also occur in New York.

From this it easy to see why the association community is somewhat cynical about the music licensing process. ASCAP and BMI have a shared monopoly; they take actions joint to preserve the monopoly; and there is no practical recourse to improve the situation except the United States Congress.

Conclusion

The American Society of Association Executives most appreciates the opportunity to address this Subcommittee on the music licensing practices of the performing rights societies. ASAE strongly supports an efficient and effective system for collection of copyright royalties by those who own performance rights to musical compositions from those who use, enjoy and profit from the copyrighted music. ASAE believes, however, that the most likely result of the efforts of the performing rights societies in the association community has been avoidance of the use of copyrighted music at association-sponsored events. While ASAE's own experiences and those of its members in dealing with ASCAP and BMI have been disappointing, we stand ready to assist this Subcommittee in any way requested to help reform the performing rights society system to assure fair payments to copyright owners without the problems of the past.

Mr. HUGHES. Let me just pick up right there. Who would do the oversight?

Mr. JACOBS. The Federal Trade Commission could regulate their marketing activities, the Copyright Office could regulate their licensing activities—somebody rather than nobody. There is no such shared monopoly in the United States, in the whole American economy, that has no oversight.

Mr. HUGHES. Do you know if there are antitrust violations? The Department of Justice has primary responsibility——

Mr. JACOBS. Mr. Chairman, the American Society of Association Executives went to the Department of Justice 3 years ago. We laid out a number of these issues. We pointed out and documented several clear violations of the earlier consent decrees—the 1976 one against BMI, the 1950 one against ASCAP.

The Department of Justice said, "We are not interested. We don't have the resources."

Mr. HUGHES. First, I must concede that there wasn't much left to the Antitrust Division in the last two administrations——

Mr. JACOBS. That's exactly right.

Mr. HUGHES. The Division was decimated, but it's being rebuilt, I might say, happily. I congratulate the administration on rebuilding that very important Division within Justice.

Mr. Mayer, I applaud your efforts to include language obligating compliance with the copyright laws in your contracts with presenters of events. I also appreciate your argument that public facilities should be exempt from the doctrine of vicarious liability, as you do not directly participate in the details of each event.

For example, it's impossible for you to know whether a trade group will sing "Happy Birthday," and that's ASCAP's song.

But isn't it even harder for copyright owners to know, and don't you benefit directly from renting the space, even if you get the same rent, regardless of whether music is played at an event?

Mr. MAYER. In our type of facility, we rent to a number of organizations. And you are right, we do not know what those organizations are going to do as far as the presentation of any musical activity, or copyrighted songs, or what have you.

As far as the rental is concerned, we try to rent the facility so that it defrays the cost of the operation of the building, in and of itself.

I'd mentioned earlier that we are a municipally owned and operated facility. And it's no secret to anybody that a lot of our cities are frankly running out of money. I've had to cut our budgets back, year after year for 2 or 3 years, just to come within our budget constraints. Our rental of the facility helps to defray our operating costs, purely and simply.

Mr. HUGHES. Did you ever check out what it would cost for you as a renter to license whatever activities you have in that particular center?

Mr. MAYER. I depend so much on what is being presented. I really don't know the exact figures of what those run, because they are based on attendance and based on the number of people coming in.

But as I indicated, we may have as few as 50 or 100 people attending a small reception or wedding reception, that kind of thing. Or up to 9,000 people attending a concert in our arena.

Mr. HUGHES. So it varies from year to year, dramatically?

Mr. MAYER. It varies not only from year to year, but from event to event.

Mr. HUGHES. So it's hard to predict.

Mr. MAYER. It is hard to predict. In our operation, and I know that background music was discussed earlier this morning, we provide background music in our lobby areas, and in banquet halls, and this kind of thing. But we control that. We can turn the switch on and off as we need to.

But we do rent that music or purchase that music from a company over the air. They pay all of the license fees in accordance with existing copyright regulations.

Mr. HUGHES. When you lease a space do you include in every contract a requirement that they pay license fees?

Mr. MAYER. Absolutely. Absolutely.

Mr. HUGHES. Have you been sued because on the basis of vicarious liability there has been a failure to do that?

Mr. MAYER. We have not.

Mr. HUGHES. So you have suffered no loss?

Mr. MAYER. We have not. No, sir.

Mr. HUGHES. I see. Mr. Swinburn, apparently your positions are very close to that of Mr. Mayer?

Mr. SWINBURN. Yes.

Mr. HUGHES. From your testimony you indicate that if the promoter of an event fails to pay the fee, that facility should pay it.

Mr. SWINBURN. Presently, as we understand it, if a facility is in a position of having an event, and music is played, and no fee is paid by the promoter, the facility has to pay it. We feel that is not fair.

Mr. HUGHES. No, that is not fair.

Mr. SWINBURN. We feel that the promoter of an event should be responsible for paying the musical licensing fees.

Mr. HUGHES. Do you include, in your contract with anybody leasing space, the same requirement, that they provide for any licensure?

Mr. SWINBURN. We encourage our members to include such provisions in their contracts, to place the burden for paying the licensing fees on the facility user or any ultimate user.

Mr. HUGHES. Do they do that? Do they follow your advise?

Mr. SWINBURN. I can't say for certain that all of them do. I think generally speaking, they do.

Mr. HUGHES. Do you know of any instances where they have included a provision requiring them to license with ASCAP or BMI, and where they were subject to liability, vicarious liability?

Mr. SWINBURN. I'm not aware of any specific examples, no.

Mr. HUGHES. Are you, Mr. Jacobs?

Mr. JACOBS. Mr. Chairman, in the trade show community, a very frustrating situation exists, because ASCAP and BMI refuse to license trade show exhibitors.

Even when a major corporation takes 50 booths in the middle of a trade show and uses music in that facility within the trade show, ASCAP and BMI will not sell a license to that exhibitor. They insist instead that the trade show sponsor buy a license that is based on fees accounted for on the basis of thousands of attendees.

Mr. HUGHES. Well, I appreciate that answer, but it is not responsive to the question.

Mr. JACOBS. I'm sorry, Mr. Chairman.

Mr. HUGHES. Are you aware of any situation where there was a contract requiring licensure where suit was brought, and the court held that because of vicarious liability, they were responsible, where they included that in the contract?

Mr. JACOBS. No, sir.

Mr. HUGHES. Mr. Jacobs, you paint a bleak picture of dispute resolution under the current regime. Yet, ASAE, through the Music Licensing Task Force, as I understand it, did negotiate with ASCAP, and entered into an agreement.

Why isn't the negotiation process adequate to address your needs?

Mr. JACOBS. I think I pointed out, Mr. Chairman, some of the defects in the negotiating process. We're not given comparables, we're not given access to what others have paid, so we don't know what is a fair price, and we have no basis for establishing it.

There's really no recourse. If the negotiations are unsuccessful, you are left with a quarter of a million dollar legal bill.

Mr. HUGHES. So, basically, your complaint is over the failure to disclose what you think should be readily available, and I agree with that.

Yesterday, we had a colloquy with ASCAP, where I indicated that I thought it unbelievable that ASCAP and BMI and SESAC could not maintain that kind of a data base to provide that kind of information.

Mr. JACOBS. They have it, Mr. Chairman. They just won't tell us what it is.

Mr. HUGHES. Well, I am led to believe that they do not have it automated. SESAC would have a lot easier time with automating it, because they just have, what is it, 2,500 in their repertoire? So it would be easier for them.

But in any event, I don't disagree with your suggestion that that information should be available.

Mr. JACOBS. Thank you.

Mr. HUGHES. It seems to me to be poor policy not to make it available so that those users can determine what their needs are. They can make a decision as to what they want to perform.

Mr. JACOBS. Their self-motivation is obvious. If they don't disclose, then you have to buy both of them.

Mr. HUGHES. I understand. I understand what the motivation is. But what I'm saying is, I agree with you, that I think that's not good policy. That's why we're holding these hearings, so we can look at some of these policies.

Well, thank you. You've been very, very helpful.

Mr. JACOBS. Thank you, Mr. Chairman.

Mr. HUGHES. We appreciate your contribution.

Our final panel today consists of what are sometimes called specialty radio stations. We are fortunate to have representatives from the religious, classical and Hispanic radio industry with us today.

Our first two witnesses, Edward G. Atsinger III, and Catherine Meloy appear on behalf of the NRB Music License Committee. Mr. Atsinger is chairman of the NRB Music License Committee, which

represents 400 specialty radio stations throughout the country. The committee negotiates with the performing rights societies.

Mr. Atsinger came into broadcasting after having taught communications at Los Angeles City College for 12 years. He opened his first radio station in 1969 in Raleigh, NC, and acquired KDAR FM in Ventura, CA in 1972.

Today, Mr. Atsinger is president and CEO of Salem Communications Corp. Salem presently operates 20 radio stations and the Salem Radio Network in Dallas, TX.

Mr. Atsinger holds a degree in speech and communications, and earned an M.A. in communications from the University of Southern California.

Catherine Meloy is the general manager for WGMS, a classical music radio station in the Washington, DC, area. Ms. Meloy has a wide range of experience in the radio industry. She has held sales and management positions at several radio stations in Washington, New York City, Baltimore, Denver, and Boston. WGMS is well known to us for its excellent classical programming, I might say.

Our third witness, Eduardo Gomez has a record of 37 years experience in radio broadcasting. He is the owner and president of KABQ Radio Station in Albuquerque, and is vice president of the American Hispanic Owned Radio Association, an association of 110 Hispanic radio stations throughout the country, on whose behalf he appears today.

We welcome your testimony today. We have your statements which, without objection, will be made a part of the record. There's nobody here to object, so they will be made a part of the record.

I hope you can summarize for me, because I have read your statements. It would be very helpful if we can get right to questions.

Why don't we begin with you, Mr. Atsinger. Welcome.

STATEMENT OF EDWARD G. ATSINGER III, PRESIDENT AND CHIEF EXECUTIVE OFFICER, SALEM COMMUNICATIONS CORP., ACCOMPANIED BY BRUCE G. JOSEPH, ESQ., WILEY, REIN & FIELDING

Mr. ATSINGER. Thank you.

Mr. Chairman and members of the subcommittee, my name is Edward G. Atsinger III. I am chairman of the NRB Music License Committee, a committee of approximately 400 specialty formatted radio stations that use limited amounts of copyrighted music in the broadcast day.

We represent a variety of stations, including religious, classical music, and foreign language stations, and have received the endorsement of the Classical Music Broadcasters Association.

I want to thank you for inviting us to testify here today. My written statement describes in detail how ASCAP and BMI squelch competition and evade the responsibilities of the antitrust decrees under which they operate.

I will not repeat all of that detail here, but would be happy to answer any questions you may have on anything that I omit in this statement.

I was stunned to read Mr. Gould's statement yesterday, saying that we seem to believe we are entitled to use the property of

music creators for free. ASCAP apparently doesn't understand our position. We do not question the need to pay for the music we use. Our problem is how ASCAP and BMI determine what we pay and how we pay it.

The fact of the matter is, it is in our best interests to encourage the production of product that we want to use.

Because of the way in which our stations use copyrighted music, they do not need, however, and should not have to pay for, the same kind of blanket license desired by the vast majority of radio stations which play copyrighted music around the clock. We seek a reasonable alternative form of license from ASCAP and BMI under which we would pay for what we use.

The antitrust judgments that govern ASCAP and BMI obligate those organizations to offer one such form of license—the per-program license—on terms and conditions that offer a real and fair alternative to the blanket license. I'm paraphrasing the language from their decrees.

Regrettably, rather than playing by the rules, ASCAP and BMI have deemed it to be in their best business interests to resist the obligation at every turn. And they've been fairly successful for over 40 years.

Mr. Chairman, you spoke yesterday of balancing the interests of users and copyright owners. We understand and agree with the need for that balance.

Congress set up a system where the burden is on the user to have a license. We do not object to that, nor do we ask that it be changed.

But what does that mean? Even a radio station that does not feature music can not be in business without ASCAP and BMI music licenses. Commercials contain music, syndicated programs contain music, even PSA's contain music, and the station does not control the contents of those kinds of programs.

Furthermore, it's often impossible or very difficult to identify the music controlled by ASCAP or BMI because they have not cooperated with the users. And because of the size of their repertories, you must deal with both ASCAP and BMI.

In no sense can they be said to compete with each other with respect to users, particularly our type of user. That's because a radio station must have licenses from both BMI and ASCAP. They both function as perfect monopolies.

So we must strike a deal with a monopolist or be off the air. And even if they are willing to negotiate, they negotiate with a gun to your head. For, if you don't take the license, they will sue you for infringement.

Now, that is not balanced in any sense of the word, in my view. ASCAP does not even make a pretense of negotiation. They say that we are bound to take the results of the negotiations they had with a different group of radio stations that admitted it had interests different from ours.

The overwhelming majority of the stations represented by that other group were around-the-clock music stations. I should say around-the-clock copyright music stations, who were interested in negotiating a favorable blanket license.

As a result, they agreed to a per-program license, with a fee rate four times the blanket license fee rate, and laden with administrative burdens and draconian penalties to further discourage its use.

Fred Koenigsberg sat here yesterday in the context of the restaurant licenses, and said ASCAP avidly embraces the suggestion to talk. Well, in 1990, we tried to talk. We asked to participate in the negotiations leading up to the licenses that we are now told we must accept. But we were told we were not wanted. We were specifically excluded.

When there was a recent change in top ASCAP management, several months ago, we contacted Mr. Koenigsberg directly with an offer to talk. We never heard back. ASCAP's position remains, take someone else's deal, or go to court to fight it. And that's not balance, in my view.

To be fair, BMI has talked. But consider what Mr. Berenson said, and I'll paraphrase. We negotiate with industry groups. Users aren't bound to take the results. But under our consent decree, BMI must issue the same licenses to everyone who is similarly situated.

What does that mean? It sounds like it means that if one group of radio stations negotiates a license in their best interest, BMI will take the position that it can't offer another deal to others, even if they weren't represented in the negotiations, even if they were excluded. That can not be what the BMI or the ASCAP decree means. If it is, this committee should act to change it.

Now, what about the rate court? BMI does not have one, so there is nowhere for a user to go if BMI sues for infringement after refusing to offer a reasonable license. And courts have held that the user can not even raise the misconduct or unreasonableness of ASCAP or BMI as a defense in an infringement action. In other words, you must take the license on the terms offered, or go off the air. That's not balance.

ASCAP has a rate court, but it is in ASCAP's own backyard, and it is very expensive. In more than 40 years since its inception—since the decree was entered—only two broadcast industries have ever had the wherewithal to go to trial over licenses. The first of these two ended in 1993, 43 years after the amended consent decree was entered.

The TV industry spent millions of dollars and years to establish that the per-program license offered by ASCAP with its fee rate four times as high as the blanket rate violated the decree obligation.

And I might add that the rate court found that the per-program license being offered by ASCAP in that case which was modeled after the radio license, that was ASCAP's position in that case, was, and I'm quoting the judge in the case, "designed to further ASCAP's aim of keeping the per-program license technically available, but practically illusory, for virtually all stations."

Our small and underfunded group of stations cannot afford to fight that battle over again. I think it took them 10 years and $10 million to get to this first step, and the case is being appealed, so it's not over. We should not have to refight that battle. But under the law today we do, and that's not balance.

In my written statement, I talk about the difficulties in identifying ASCAP and BMI's repertoire. The list submission method that both ASCAP and BMI discussed yesterday are useless to anyone in business.

Members of our committee have tried that method. ASCAP failed to respond for months. After repeated reminders, we finally got a response. On an average, it has taken 4 to 5 weeks to get a response to a list of 100 titles. You cannot run a business waiting 4 or 5 weeks for that kind of information.

We applaud Chairman Hughes' suggestion that immediate online access to a computerized data base is long overdue, and in today's world, there is no excuse for not providing that information in this way.

And let me say I've heard these claims before, that ASCAP and BMI can't provide that kind of information. We, at every meeting, going back many, many years to the 1980's, at every meeting, we asked for a user-friendly data base.

First, we were told that it didn't exist, that it was impossible, that it would be prohibitively expensive, and even if it were created, that it would be impractical, because publishers and writers change affiliations frequently.

You heard much the same yesterday. Well, the fact is, after being involved in music licensing for a little bit longer, we have learned that both of them have these data bases, and have had them—extensive computerized data bases—for just the kind of information users need, which they use for their own distribution purposes and other internal purposes.

Finally, one final note about SESAC. The innovative new approach that SESAC offers could lead to a whole new era of competition in music licensing. It could be a very healthy development. But it is doomed to fail if ASCAP and BMI continue to offer no real alternative to their blanket licenses.

There can be no competition unless users that use more SESAC music are able to reduce ASCAP and BMI license fees. And that can not happen under the blanket license or under the unusable per-program license that has been offered by the groups to us historically and currently.

Those are the main points that I want to make. I thank you for your consideration, and I'm available for questioning.

Mr. HUGHES. Thank you, Mr. Atsinger.

[The prepared statement of Mr. Atsinger follows:]

Prepared Statement of Edward G. Atsinger III, President and Chief Executive Officer, Salem Communications Corp.

Mr. Chairman. My name is Edward G. Atsinger III. I am the President and Chief Executive Officer of Salem Communications Corporation, which operates 20 radio stations throughout the United States. I am also the Chairman of a committee of approximately 400 specialty format radio stations that use limited amounts of copyrighted music in their broadcast day. The committee was originally formed under the auspices of the National Religious Broadcasters association. Thus, although we now represent a variety of specialty formatted stations, including religious, classical and foreign language stations, and have received the endorsement of the Classical Music Broadcasters Association, we continue to be known as the NRB Music License Committee.

I want to thank you for inviting me and my colleague Cathy Meloy, General Manager of radio station WGMS, Washington's own classical music station, to testify at this hearing. I hope that we will be able to shed some light on the methods used by ASCAP and BMI to squelch competition and evade the responsibilities of the antitrust decrees under which they operate. We will describe to you the Catch-22 realities broadcasters who use limited music face, and will

suggest possible legislative solutions for your consideration. In particular, we will describe how:

- ASCAP and BMI have flouted their obligation to offer broadcasters a viable alternative to the blanket license;
- ASCAP and BMI refuse to identify their repertories in any meaningful way, thereby depriving users of any choice;
- Although we were intentionally excluded from the negotiations leading to the current ASCAP licenses, ASCAP now insists that we take those licenses; and
- SESAC's revitalization as a potential competitor to ASCAP and BMI requires ASCAP and BMI licensing reform.

What brings our diverse group of stations together is one important aspect of our programming, our limited use of copyrighted music. Unlike typical radio stations -- whether they do top 40, country music, adult contemporary, or other popular music formats -- that on average perform eleven copyrighted titles each hour, 365 days a year, the stations represented by our Committee feature performances of copyrighted music infrequently, and typically derive little revenue from those performances. Thus, we do not need, and should not have to pay for, the same kind of round-the-clock "blanket" license desired by the vast majority of radio stations. Our mandate is to obtain a reasonable alternative license from ASCAP and BMI that recognizes these essential differences in format.

We do not question the need to obtain licenses for the radio performance of copyrighted music. Our problem is how those licenses are set, and what they require.

Our goal should have long ago been achieved. The antitrust judgments that govern ASCAP and BMI resulting from suits brought by the Justice Department obligate those organizations to offer one such form of license, the "per-program" license, on terms and conditions that offer a real, and fair alternative to the blanket license. Regrettably, rather than playing by the rules, ASCAP and BMI have deemed it to be in their business interests to resist this obligation at every turn. The per-program licenses they offer are designed to cost more than the blanket license if you use even one feature performance of an ASCAP or BMI title in about twenty-five percent of your programs. In addition, a station's ability to use the per-program licenses now offered is further dramatically reduced by burdensome and unnecessary administrative and reporting requirements and draconian penalties for unavoidable reporting errors.

On top of that, ASCAP and BMI both refuse to tell us, in any useable way, what songs are in their repertories. Thus, we cannot make meaningful decisions about music use. We cannot seek out alternatives to ASCAP or BMI music. We are told by ASCAP and BMI that we are buying unlimited "access" to their repertories. In fact, we are buying a pig in a poke.

Now consider the combined effect of these two licensing practices. We are told we will only be able to save money on music licensing if we eliminate ("clear") copyrighted music from 75% of our programs. But we cannot clear our programs if we cannot as a practical matter learn what is controlled by ASCAP or BMI. That's the Catch!

The situation is intolerable. Although we have been fighting for years, our relatively small group of stations cannot afford to fight against the full strength of ASCAP and BMI. But I have gotten ahead of myself. Our predicament would be clearer if I provided some background about the music licensing world in which we operate.

I. ASCAP AND BMI RESISTANCE TO BLANKET LICENSE ALTERNATIVES

Every radio broadcaster must, as a practical matter, have a license from both ASCAP and BMI. Music appears in commercials, syndicated programs, and even public service announcements. That music is about equally divided between ASCAP and BMI. The broadcaster has no control over many of these sources. He or she cannot decide to avoid all use of ASCAP music, or all use of BMI music. Without a license, a broadcaster will be sued for copyright infringement.

Nor are ASCAP or BMI shy about suing for infringement. Stations that attempt to avoid playing ASCAP music to eliminate the need for a license are carefully monitored and

are sued. ASCAP is not a copyright owner and does not have the right to sue for infringement. It avoids this disability by bringing suit in the name of its member, often without the knowledge of the copyright owner, who has granted ASCAP a generalized authorization to sue in its name. In fact, it is my understanding that ASCAP is the most frequent litigant in Federal courts. Aside from increasing the burden on the courts, the joining of collective enforcement power with the pooled licensing power creates enormous potential for abuse and further increases ASCAP's and BMI's ability to impose their will on stations.[1]

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[1] Although we do not object to the concept of collective enforcement by copyright owners, there is no justification for linking the immense market power of a collective licensing organization with collective enforcement activities. Collective licensing is necessary for the system to work for both users and owners. It is, however, a privilege that must be closely monitored lest the power it creates be abused.

Collective enforcement by the collective licensing organization creates enormous potential for such abuse. We believe that if the Subcommittee were to examine ASCAP's and BMI's enforcement practices, it would find numerous examples of enforcement being used to enhance the collective licensing power.

Let me give you an example of the absurd results that can obtain. At ASCAP's urging, courts have rejected defenses raised by users charged with infringement who argue that they were not licensed due to ASCAP's wrongful conduct (e.g., refusal to license, or violation of the Amended Final Judgment). The courts have concluded that ASCAP is not technically a party. On the other hand, when a defendant seeks discovery from the nominal plaintiff copyright owner, ASCAP resists, on the ground that ASCAP is the real party in interest. Even if Congress decides that ASCAP should be

(continued...)

Thus, ASCAP and BMI do not compete with each other. Each is a pure monopolist. Radio stations must deal with both, and must take the licenses that are offered.

A. The Blanket License

Both ASCAP and BMI have recognized that their market power can be best exploited using a form of license called the "blanket license." Under a blanket license, a radio station obtains the right to use all music in the organization's repertory all day long for a flat fee. Of course, the flat fee reflects the large amount of music that could be used under such a license.

Why do ASCAP and BMI like the blanket license so much? First, it costs very little to administer. Licensed stations simply pay their fees. ASCAP and BMI need do nothing but collect. Second, a station on a blanket license has no incentive to limit its use of ASCAP or BMI music. Thus, more music is used, and that makes ASCAP and BMI and their writers and publishers happy, and enables ASCAP and BMI to justify even higher fees the next time around. Third, any station that does limit its use of music pays the same as if it were a top 40 station, so ASCAP and BMI collect more money.

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[1](...continued)
allowed to continue its enforcement activities, the Committee should consider allowing ASCAP/BMI misconduct and violation of their respective antitrust decrees to be raised as a defense in infringement actions brought by ASCAP/BMI.

Finally, a station with a blanket license has no incentive to find alternative, competitive sources of music, to substitute the music of one organization for that of another, or to seek out non-music programming. In short, the blanket license perpetuates the status quo. ASCAP and BMI like that just fine.

But don't take my word for it. A respected Magistrate Judge in the Southern District of New York, the "Rate Court" charged with overseeing ASCAP licensing, recently found:

> ""ASCAP's market power . . . is most clearly exercised by its preference for the blanket license.""
>
> "Since the early 1940's ASCAP has viewed the per-program license [mandated by the antitrust decree under which it operates] as inconsistent with its business interests."

United States v. ASCAP (Application of Buffalo Broadcasting Co.), 1993-1 Trade Cases (CCH) ¶ 70,153, at 69,680, 69,683 (S.D.N.Y. Feb. 26, 1993) (citation omitted) (hereinafter, the "Local TV Rate Court Decision").

B. The Per-Program License

The Department of Justice early on recognized the threat posed by the blanket license. In 1941, to settle an antitrust suit it brought, the Department entered into a consent decree with ASCAP obligating ASCAP to offer a "per-program" license in which the fee charged varies with the

number of programs that use ASCAP music. The provisions governing the per-program license were strengthened in the amended final judgment entered in 1950 between the Government and ASCAP. United States v. ASCAP, 1950-51 Trade Cases (CCH) ¶ 62,595, § VII(B) (S.D.N.Y. March 4, 1951) (the "Amended Final Judgment"). The per-program license was established as the preferred form of license -- the only type of license ASCAP was required to offer. Local TV Rate Court Decision at 69,685 (citing Amended Final Judgment, §§ VII (A) & (C)).

In fixing fees for its licenses, ASCAP was ordered:

> to avoid any discrimination among the respective fees fixed for the various types of licenses which would deprive the licensees or prospective licensees of a genuine choice from among such various forms of licenses.

Amended Final Judgment, § VIII. The Amended Final Judgment was intended to bar ASCAP from "denying a per-program license to eligible licensees by overpricing it in comparison to the blanket license." United States v. ASCAP (Application of Turner Broadcasting System, Inc.), 782 F. Supp. 778, 812 (S.D.N.Y. 1991).

BMI entered into a similar decree in 1966, which required BMI to offer a per-program license and to price it in relation to the blanket "so that there would be no frustration of the purpose . . . to afford broadcasters alternative bases of license compensation." United States v. BMI, 1966 Trade Cases (CCH) ¶ 71,941 (S.D.N.Y. 1966).

As the ASCAP Rate Court has held, the ASCAP decree made the per-program license the preferred alternative, in order to "serve[] as a counterbalance to ASCAP's market power." See Local TV Rate Court Decision at 69,680, (quoting Turner, 782 F. Supp. at 810). The Court recognized, as other courts have recognized before, that the per-program license itself was intended to provide competition to the blanket license, and opened additional competitive possibilities. Local TV Rate Court Decision at 69,683. See also ASCAP v. Showtime/The Movie Channel, Inc., 912 F.2d 563, 570 (2d Cir. 1990) (per-program license provides an incentive to seek source or direct licenses).

In theory, for example, under a per-program license, if ASCAP music was priced too high in relation to BMI music, a broadcaster using a per-program license could substitute BMI music for ASCAP music. Or a broadcaster could enter into direct licenses with large publishers, or use music from a music library with rights already cleared. Further, as will be discussed below, a realistic per-program license could even stimulate the formation of new, competitive music licensing sources, just as its absence could destroy such competition.

C. ASCAP and BMI Resistance to their Per-Program Obligation

Ever since entering into their antitrust decrees, ASCAP and BMI have fought tooth and nail against offering a real per-program license. Today, the license they offer to radio stations has a fee rate that is set at about four times the rate of the blanket license. Thus, unless a radio station clears feature performances of an organization's music from about 75% of your programs, it is cheaper to take the blanket license. If you use a feature performance of ASCAP music in only 15% of your programs, you still pay almost 60% of what you would have paid under the blanket license -- what you would pay if you were a hit music radio station using all copyrighted music. On top of that, both ASCAP and BMI impose unreasonable, and unnecessary, reporting burdens on the per-program license that make it more expensive to use and even less attractive. This is not a genuine alternative.

Consider a religious format station, such as Salem Media's KGNW, in Seattle, Washington. The station airs teaching and preaching programs. People don't listen for the music. But even if just 25 - 30% of its programs contain a single feature performance of ASCAP music (e.g., a hymn), our license fees would be the same as if it were an all music station playing ASCAP music around the clock. And the station starts at a further disadvantage if, as is common, it

uses any pre-recorded syndicated programs during the day. The station has no control over the musical content of syndicated programs.

In 1991, KGNW used ASCAP music in just 30% of its weighted programs and paid 95% of the blanket license fee. The station was lucky its fee did not exceed the blanket fee. In 1992, KFAX in San Francisco used BMI music in just 4% of its programming periods, but paid BMI more than 17% of the blanket fee; and KGER, our station in Long Beach, California, used BMI music in 7.6% of its programming periods, but paid BMI 26% of the blanket license fee.

Consider also a concert music station performing classical music. Most of that station's music is in the public domain. But if only a single piece per hour/programming period is controlled by ASCAP/BMI during just 25 - 30% of the hours/periods the station is on the air, the station pays as much under the per-program license as it would pay under the blanket license. And because classical pieces tend to be long, a single title can easily run into more than one period. I can think of no other good or service that is priced in this manner. It simply isn't rational or fair.

The local television industry has spent close to ten years and ten million dollars fighting with ASCAP in the Rate Court over the per-program license issued to television.

ASCAP offered television a per-program license with a four to one fee rate ratio modeled after the current radio licenses. After a lengthy trial, the court found that "ASCAP's per-program proposal is designed to further its aim of keeping the per-program license technically available, but practically illusory for virtually all stations." Local TV Rate Court Decision at 69,685.

The Court rejected ASCAP's four to one proposal and opted for the very reasonable conclusion that the relationship between blanket and per-program license fees should be set so that a station using music in a manner consistent with the industry's average use would pay the same under the blanket and per-program licenses.[2] ASCAP is appealing the decision.

The Rate Court's decision in the local television case is, of course, potentially very helpful to local radio stations such as those represented by our Committee. Unfortunately, however, although the Court reached its decision largely as a matter of interpretation of the Amended

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[2] The Court also imposed a relatively small additional administrative charge on stations using the per-program license to cover ASCAP's additional costs. We do not agree with this aspect of the Court's decision. The cost of administering the per-program license, which is the one form of license ASCAP and BMI are required to offer under their respective judgments, should be part of the organizations' general cost of doing business. The stations already bear a substantial additional administrative burden as a result of the reporting requirements of the per-program license.

Final Judgment, the Court did not find its result to be the only result consistent with the decree. Rather, the court stated that it set the relationship between blanket and per-program license on the basis of all of the factors in the extensive record presented to it.

Regrettably, we do not have ten million dollars, or even one million dollars to fight the kind of fight and develop the kind of record developed over ten years by the local television industry. Nor would a rational system require the issue won at great cost by the television industry to be fought again.

An appropriate relationship between blanket and per-program license fee rates is mandated by the ASCAP and BMI decrees. It should be fixed as a matter of law.

D. The Administrative Barrier To the Per-Program License

Fee discrimination is not the only barrier created by ASCAP's and BMI's per-program licenses. The per-program license imposes unduly burdensome, and wholly unnecessary, bookkeeping and reporting requirements. These are coupled with draconian penalties should a broadcaster make a mistake.

First, reporting requirements. Per-program license users are required to file monthly logs which report every feature performance of music used on every program that the user does not concede to contain ASCAP or BMI music. What do

ASCAP and BMI require per-program license users to report for each song? The full title, name of composer, author, and publisher, name of the performing artist in a sound recording, the record company, and all information relating to composer, author, and publisher shown on the record label. How much of this information is necessary? Well, when ASCAP itself tracks musical performances for purposes of awarding royalties to its members, it requires its trackers to report only the author and title of composition. That's it. The rest is unnecessary for ASCAP's purposes. I might add, when ASCAP seeks to identify a song for distribution purposes it needs to identify the composer and publisher to know who to pay. For purposes of the per-program license, ASCAP only needs to determine whether or not the title is in the ASCAP repertory.

Should a radio station omit any information needed for identification, the ASCAP and BMI per-program licenses create an automatic presumption that music is licen[illegible]v the organization, and a fee must be paid.

Although this burden varies from station to stat[illegible] it is not uncommon for stations to devote many hours each month to the completion of ASCAP's reports. For classical stations, which perform music all day long, the can be enormous. Ms. Meloy's station is lucky in this regard.

Their play lists are computerized. Many smaller classical stations must report manually.

Religious stations face their own difficulties. Much of the music performed on religious stations is contained in syndicated programs. Thus, the broadcaster must rely on information from the program producer, often a small church or ministry. These reports are often late, incomplete, and inaccurate.

Not only are these reporting requirements onerous, they are wholly unnecessary. Music use can be determined on the basis of a representative sample of periods. Random sampling in several months selected by ASCAP and BMI could provide the information necessary to calculate license fees without creation of yet one more hurdle to the use of the per-program license. Indeed, ASCAP's own system of distribution of royalties to its members, which I alluded to earlier, is based on very limited sample surveys. But once again, what's sauce for the goose is, in the case of ASCAP's per-program license, not sauce for the gander.

A further new opportunity for reform is presented by the emerging technology of music identification. I will discuss below the approach to music identification that SESAC has proposed to use.

On top of the onerous reporting requirements the ASCAP and BMI per-program licenses add draconian penalties should a

station make a mistake. The result is that many of the music-poor stations for whom a per-program license should be tailor made simply can't afford to take it.

ASCAP's per-program license is ahead of the trend in criminal legislation toward a "three strikes and you're out" policy, with one notable exception: in this case, a broadcaster can be totally innocent of using non-reported ASCAP music and still be out. Should a broadcaster mistakenly fail to report even a single musical composition, whether or not the composition is in the ASCAP repertory, in a program which the broadcaster rightly or wrongly claims is free of ASCAP music, ASCAP can seek, in its sole discretion: for the first "strike," $500 plus the monthly license charge that would be applicable to that station under the blanket license; for the second "strike," $500 plus twice the monthly blanket license charge; and for the third "strike," $500 plus three times the monthly blanket license, and automatic disqualification of the broadcaster from use of the per-program license for the remainder of the five year license term. Three strikes and you're out -- whether the mistake is intentional or not, whether the broadcaster is innocent or not, and whether the missed music is in the ASCAP repertory or in the public domain!

Again, what does this mean practically? For one of our stations, KKLA of Los Angeles, we calculated in 1992 that a

single omission, whether or not it involves an ASCAP song, would cost over $6,800, more than a third of its total annual per-program fee. A second omission would cost more than 70% of its total annual fee, and a third omission would not only knock KKLA off the per-program fee for the remainder of its license, it wold cost it more than the total annual fee under the per-program license.

Keep in mind that ASCAP's own surveys show that errors in reporting by stations are common and, because of problems such as the inability to verify music played on syndicated programs, inevitable. Nevertheless, ASCAP's per-program license penalizes stations for mistakes, intentional or unintentional, involving ASCAP music or not, at ASCAP's sole discretion. Such a system cannot in any sense be said to be reasonable, and presents significant barriers to the per-program license being the "genuine alternative" that ASCAP is required to offer by the Amended Final Judgement.

In fairness, I should add that the per-program license being offered by BMI is somewhat less harsh in its penalty provisions, providing for a station to "redeem" itself by error-free reporting for eighteen consecutive months, and for somewhat lower fines. Nevertheless, the BMI license is still based on the unrealistic requirement of perfect reporting of all music use, and is modelled after the ASCAP three strike rules.

II. ASCAP'S AND BMI'S REFUSAL TO IDENTIFY THEIR REPERTORIES

One way for a consumer to reduce the amount of money it pays for a product or a service is to reduce the amount of the product or service that it uses. There is nothing sinister or evil about this. Free choice is part of the cornerstone of our society. The law of supply and demand, which holds that when prices go up, demand and use go down, is possibly the most basic tenet of our economy.

Incredibly, the customers of ASCAP and BMI, music users, do not have this fundamental choice. To make this choice, users need to know what music is controlled by ASCAP and what music is controlled by BMI. But ASCAP and BMI tell us we do not need to know what is in their repertory; we are buying "access" to everything. In fact, contrary to ASCAP's antitrust decree, they specifically make it difficult to learn what music is and what music isn't their's.

The Justice Department recognized the importance of full disclosure of repertory to the fair functioning of the music licensing business. In the 1950 ASCAP Amended Final Judgment, ASCAP was ordered:

(i) immediately to respond to written requests from users with respect to specified titles;

(ii) immediately "to make available for public inspection such information as to the ASCAP repertory as it has;" and

> (iii) within two years of the judgment, to maintain and keep current and make available for inspection, a list of all musical compositions in the ASCAP repertory, which shows the title and other information from which the public can discern copyright and licensing status.

Forty-four years later, ASCAP still does not make available "such information . . . as it has." Among other things, ASCAP has an extensive computerized data base covering the vast majority of titles in its repertory that are still played. And forty-four years later, ASCAP has still not maintained or kept current a list of titles. BMI also has an extensive computerized data base of its titles.

Rather, broadcasters must play twenty questions to learn whether a title is in the ASCAP or BMI repertory. But there are conditions on that as well. In our experience, lists of songs submitted must be limited to less than 100 titles. ASCAP and BMI take from three to five weeks to respond. I can tell you that you simply cannot run a radio business and make programming decisions on this basis.

In short, users are kept in ignorance, for a reason. If you don't know what you are buying, you can't make the decision not to buy it or to buy it from somebody else.[3]

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[3] I should also add that although courts have hailed the ability of users to use a per-program license as a bridge to the creation of a system of direct licenses from copyright owners, the ASCAP per-program license frustrates that as well. Buffalo Broadcasting Co. v. ASCAP, 744 F.2d 917, 916-28 (2d Cir. 1984), cert. denied, 469 U.S. 1211 (1988). Under the ASCAP per program license that is now offered, even if

(continued...)

Even if you are on a per-program license, the chances are good that you will wake up, as WGMS did, and find you owe as much or more than you would have on a blanket license.

III. THE TAKE IT OR LEAVE IT PROCESS

At this point, you are probably asking how it is that representatives of radio stations agreed to these terms for the ASCAP and BMI per-program licenses. The answer is simple. The committee of radio stations that ASCAP and BMI negotiated with represented its own interests, which differ from ours. We can't fault them for that. That was their job.

We can fault ASCAP. ASCAP has long known that our mandate is to seek and obtain a reasonable alternative to the blanket license. Yet, when we sought to participate in the negotiations, so that the entire industry would be represented, we were told we were not wanted.

The outrage is that after ASCAP finished negotiating with the other committee, they turned to us and said, this is the only license we will offer to you. Take it or leave it.

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[3](...continued)
you pay for a license from an ASCAP composer, you must still count the performance as one that is subject to fee under the per-program license. In essence, you must pay twice. There is absolutely no justification for this subversion of the goals of the per-program license.

How did this all come about? Although its antitrust decree requires it to negotiate with all interested potential licensees, ASCAP has long preferred a single, industry-wide negotiation, for the radio industry. In 1990-92, as in the past, it negotiated the licenses it now offers with a committee called the Radio Music License Committee (RMLC).

The vast majority of RMLC stations, about 87% of the 3,000 stations it represents, are all-music stations, which are clearly interested in favorable terms for the blanket license, and have no interest in alternatives. The agenda of those stations is simple -- make the best possible deal on the blanket license.

The most significant group of the remainder of the stations represented by the RMLC are all-news or all-talk stations, which make no feature uses of any music. For their interests, the RMLC has negotiated within the per-program license an "incidental use" or "base" fee, to cover music in commercials, jingles, backgrounds and the like. However, these stations have no interest in the fee charged for the feature performance of music, or in the reporting requirements for feature music use, or in the penalties for failure to report.

Only a tiny percentage of the stations represented by the RMLC had formats that used music in the manner of the stations in our committee. Thus, the RMLC could not afford

diverged substantially from the interests of the stations represented by the RMLC, which were more aligned with ASCAP's preference for the blanket license. Nevertheless, ASCAP selected the party it was willing to deem an "industry representative," and elected to exclude other interests.

Of course, once the agreement with the RMLC was negotiated, ASCAP completed its strategy, taking the position that we are required to accept the results of that negotiation. Although it was unwilling to "complicate" its RMLC negotiations with the interests represented by our Committee, ASCAP now contends that the stations represented by our committee were adequately represented by the RMLC, and so must take the licenses there negotiated.

Having consciously excluded known interests from the negotiations, it strains credulity and all bounds of fair dealing for ASCAP to take the position that we are now bound to the results of that negotiation. Congress should not countenance such conduct.

In fairness to BMI, although we also were excluded from its negotiations with the RMLC, our discussions with BMI are continuing. Without commenting on these ongoing discussions, I would note that in the past, BMI has adopted the same take it or leave it position as ASCAP. Thus, action by this Committee could ensure that BMI does not adopt such a position this time around.

IV. SESAC's RE-EMERGENCE HIGHLIGHTS THE NEED FOR ASCAP AND BMI REFORM.

The third performance rights organization, SESAC, has been reinvigorated in recent months under new leadership. The direction SESAC is proposing, based direct competition with ASCAP and BMI and on new technological methods of music identification, is an exciting alternative to the ASCAP and BMI approach in many respects. However, in the absence of significant reform in ASCAP and BMI practices, SESAC will become not an opportunity, but an additional burden. SESAC's emergence provides Congress with both an opportunity and an excellent example of the need for reform.

A. SESAC's New Approach.

SESAC has stated that it intends to establish a catalog of composers and publishers in niche markets. Its first target market is Hispanic music. It has announced plans to offer a revolutionary per use license.

Users will not be required to report music use. SESAC will use an automatic monitoring device that will listen to all licensees, and use known "fingerprints" to recognize music. In a reversal of the ASCAP and BMI approach, the SESAC system will report all known music use to the station as part of the service, and will bill automatically. SESAC

has stated that it will make its repertory publicly available in a usable way.

B. ASCAP and BMI Practices Must First Be Reformed.

SESAC's plan might presage a new era marked by competition and service to users rather than monopolization in music licensing. Or it might be the birth of a new monopolist that will serve little purpose other than creating a third licensing organization that must be paid with no relief for users. The key is whether ASCAP and BMI are required to offer a real alternative to the blanket license that is beneficial to all users and that allows competitive sources of music licensing to develop.

If ASCAP and BMI are permitted to continue as they have, increased use of SESAC music in a niche market will not lead to a reduction in ASCAP or BMI fees. Rather, the historical pattern will repeat: ASCAP and BMI will again negotiate a blanket license and a worthless per-program license with the broadcasters' committee of their choice. Because loss of a niche market will have little impact on ASCAP's or BMI's overall repertory, and because that committee will act for the interests of its overwhelming majority, the reduction of ASCAP or BMI repertory in the niche market will be given little significance in the negotiations. Stations in the niche market will still need ASCAP and BMI blanket licenses.

to risk its negotiations on issues of greater importance to the largest group of its stations in order to force ASCAP to comply with its obligations under the Amended Final Judgment.

The RMLC recognized the divergence of interests in the radio industry and that it was not the representative of all interests. In a September 28, 1990 letter to ASCAP, the RMLC advised ASCAP that "the radio industry is extraordinarily diverse and there may be certain stations (such as those represented by the Religious Broadcasters' Committee) whose interests are not represented by the [RMLC]."

Early in the process, in August, 1990, our Committee sought to join in the negotiations, to satisfy ASCAP's desire for a single, industry-wide negotiation. ASCAP refused, stating that "industry-wide negotiations would be greatly complicated by the presence at the table of other parties." ASCAP did note that if the RMLC wanted to invite our Committee, it would reconsider its position. The RMLC, pursuing its own stations' interests, told ASCAP that it did not represent the entire industry, but reasonably concluded that it would prefer to continue to negotiate alone with ASCAP.

Throughout this period, ASCAP knew, from years of communications and pending litigation, of our position with respect to the blanket and per-program licenses. ASCAP also knew that with respect to those licenses, our interests

On top of that, they will be required to pay growing amounts to SESAC.

Alternatively, if ASCAP and BMI licensing practices are reformed, the following could occur. SESAC offers stations a competitive alternative for music licenses. As use of SESAC music increases, use of ASCAP and BMI music will necessarily decrease. If fees are reasonably related to the amount of music used, and the organizations are required to identify their music, stations will have an opportunity to select the music of the organization with which they want to deal. This is the essence of competition -- competition that ASCAP and BMI have fought from the start.

One scenario is a more competitive music licensing industry. The other, a further monopolistic burden. History has shown that neither ASCAP nor BMI will take a step toward enhanced competition voluntarily. We urge Congress to make sure that this opportunity for real reform is not missed.

V. PROPOSALS FOR CONGRESSIONAL ACTION

Based on the foregoing, we ask Congress to consider several actions.

While many of the principles of the ASCAP Amended Final Judgment and BMI consent decree are sound, the obligations on the performing rights organizations should be strengthened by law, and a direct right of action should be provided to users

who are prejudiced by their failure to comply with their obligations. Among the most important points that need strengthening are:

a. the obligation to offer a viable use-based alternative to the blanket license. The relationship of the alternative to the blanket license should clearly be mandated as a matter of law, and the burdens caused by use of the alternative should be minimized;

b. the obligation to provide real-time, on-line access to the titles in their repertory and relevant information concerning the copyrights of those titles; and

c. the obligation to negotiate with all interested segments of an industry.

We also ask the Subcommittee to consider the effects of ASCAP's and BMI's enforcement activities. Ideally, we believe that collective enforcement activities should be separated from collective licensing. This would be a simple correction, that would ensure that the enforcement and collective licensing powers are not abused. Alternatively,

legislation could be crafted to provide that ASCAP and BMI conduct should be considered relevant in defense of an infringement action. At minimum, the Subcommittee should consider an investigation into ASCAP/BMI litigation practices and their connection to licensing.

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We thank the Subcommittee for its attention to these important matters. My colleagues and I would be happy to assist the Subcommittee in any way that we are able.

Mr. HUGHES. Ms. Meloy, welcome.

STATEMENT OF CATHERINE A. MELOY, GENERAL MANAGER, WGMS RADIO STATION, ON BEHALF OF THE NATIONAL RELIGIOUS BROADCASTERS MUSIC LICENSE COMMITTEE

Ms. MELOY. Thank you, Mr. Chairman.

As you stated, I am the general manager of radio station WGMS, which is an intrical part of classical music here on Capitol Hill, and in the entire Washington, DC, area. We have been in this format, and we are the longest running format in Washington, since 1947.

The station is a member of the Classical Music Broadcast Association. I, in fact, was president of that association in 1992 and 1993. We are represented in our licensing dealings with ASCAP and BMI by the NRB Music License Committee, chaired by Mr. Atsinger.

I appreciate the opportunity to appear today, and to tell you, firsthand, about the problems experienced by our station in its attempt to control its music use and its licensing costs. Our experience provides an excellent example of the problems discussed by Mr. Atsinger, problems that can result from the combination of ASCAP's refusal to identify its music and the inequities of the per-program license.

In 1991, my station began an effort to identify the licensing status of the music it played. We were told by ASCAP that it would provide information on specific titles if a list was submitted to its New York office for review.

In the fall of 1991, we submitted a list of about 40 compositions. It took more than 5 weeks to receive a response. And that response was a list which was limited to only the current status of the titles, and it did not include the data on which the titles would move into public domain.

Mr. Chairman, we determined that this service was really worthless to us. We simply could not identify the licensing status of the music we performed by waiting 5 weeks to receive only 40 titles.

Our total repertoire is over 40,000 titles. Of that total, we regularly perform 8,000 titles—more than 1,800 titles per month. At that rate, it would have taken 200 lists or more than 20 years to identify our 8,000 titles. In this age of computerization, that is inexcusable.

We next sought to obtain access to ASCAP and BMI's computerized data base of titles. Written requests were made to both organizations. Both ASCAP and BMI refused to grant us access to use their data base.

The only other resources available to users for identification of ASCAP music are the ASCAP list of members and the ASCAP symphonic catalog. Now, the latter document, the ASCAP symphonic catalog, is 17 years out of date, and does not include instrumental or chamber music.

Even if a title is in the symphonic catalog, it may have long since passed into the public domain. The list of members is equally worthless, as it does not indicate what compositions have passed into the public domain, and does not distinguish the compositions of a composer that may license only part of his or her repertoire to ASCAP.

Based on ASCAP and BMI's refusal to provide meaningful identification of their repertoires, we had no choice but to abandon our efforts as a waste of time. We simply could not dedicate the resources to this fruitless effort.

In spite of our inability to learn about the license status of the music we performed, we were firmly convinced that the overwhelming majority of our music is in the public domain. After all, most of the composers whose work we performed died before this century.

Thus, despite the uncertainty and the inability to control our performances of licensed music, we decided to use the per-program form of license issued by ASCAP and BMI.

When we went back to look at the results of 1992, we were shocked. Based on our best understanding of ASCAP's classical repertoire, we estimated that approximately 20 percent of our program contained ASCAP music. This would have led to a license fee of about 75 percent of the fee we would pay under the blanket.

While even this would have been unreasonably high for that amount of music, we figured it was better than paying the blanket license fee.

Under the per-program license, we were required to send ASCAP and BMI reams of monthly music reports, generated by our computer system. In this, we are fortunate. At least our play list is computerized. Before computerization, it required a substantial portion of the time of one employee, merely to coordinate our per-program license reports.

In our reports, we identified approximately 22 percent of our weighted hours as containing ASCAP music. When ASCAP sent our monthly music reports back, we discovered that they claimed 30 percent of our weighted hours contained ASCAP music.

As a result, after all the efforts, we wound up paying more than 99 percent of the amount we would have paid under the blanket license as a per-program fee in 1992. I want to state that one more time—99 percent of the blanket license fee in 1992.

ASCAP has not told us the basis for their claims, so we have not determined if they are correct. My music director, Jim Allison, has advised me that at least one of the titles that had been identified as being in the public domain on our 1991 list of 40 titles, that was Rachmaninoff's popular "Piano Concerto Number 2," was claimed by ASCAP in 1992.

Even if ASCAP's 1992 claims are correct, it highlights the difficulty that the current system presents to the correct identification of the licensed music. If, on the other hand, ASCAP is wrong, it indicates a different, and in some ways, a much more serious problem of false claiming.

We have also used a BMI per-program license. BMI's classical music repertoire is so small that only a little more than 2 percent of our program periods contain any BMI music. And it is reasonable to expect these programs contain only one BMI title. Thus, we use BMI music at a rate of less than one-fiftieth of a popular music station.

Nevertheless, in 1992, for example, we paid more than 31 percent of what we would have paid under the blanket license. Again, our fee is much higher than our use would justify.

Based on a 2-month sample of the music reports returned by ASCAP, we have been able to estimate that approximately 17 percent of our repertoire has been claimed by ASCAP.

Even assuming all of the titles claimed by ASCAP are ASCAP's, this is a far smaller percentage of ASCAP music than the 50 percent that most popular music stations perform. Nevertheless, our fee was just the same as if we used ASCAP music in every one of our programs.

Under a rational system of music licensing, we would be able to control our music use in order to control our licensing fee. Under a rational system of music licensing, the use of a single ASCAP title, in 30 percent of our program hours, would not cost us as much as the use of ASCAP music 24 hours a day. The system that exists today is simply not rational.

Mr. Chairman, the current system of music licensing does not offer a fair alternative to stations like ours that use limited amounts of copyrighted music. Despite our attempts, we have been stymied in our efforts to learn who controls the music we use.

Until we have that information, we can not realisticly determine whether the copyright music is worth performing, whether we should perform more music from the public domain, or whether we should seek alternative sources of programming.

This is a choice that every consumer should have the right to make. After this experience, I can understand why so many stations simply throw their hands up and take the blanket license.

I believe, and very strongly, that classical music stations play an important role in the culture of our Nation. But we are neither rich nor are we powerful, and there are not many of us. Even joined with other formats, we cannot spend millions of dollars to obtain licensing reform in the courts, nor should we have to.

All we ask is that we have the opportunity to pay for what we play on a reasonable basis, and that we be given the opportunity that all other consumers enjoy, to decide on our own what and how much of somebody's product we want to buy.

Thank you for your attention today. I urge you to consider the recommendations set forth in Mr. Atsinger's testimony.

Mr. HUGHES. Thank you, Ms. Meloy.

[The prepared statement of Ms. Meloy follows:]

Prepared Statement of Catherine A. Meloy, General Manager, WGMS Radio Station, on Behalf of the National Religious Broadcasters Music License Committee

Thank you Mr. Chairman. My name is Cathy Meloy. I am the General Manager of Radio Station WGMS, the station that has been an integral part of classical music here on Capitol Hill and in the entire Washington, D.C. area since 1947. I am sure you and many of your colleagues have heard our signal in a variety of places here on in the Capitol.

WGMS was the first FM signal licensed to Washington. We have the distinction of being the longest running consistent format in the city. The station is a member of the Classical Music Broadcasters Association ("CMBA"). In fact, I was President of CMBA during 1992 and 1993. We are represented in our licensing dealings with ASCAP and BMI by the NRB Music License Committee chaired by Mr. Atsinger.

I appreciate the opportunity to appear here today to tell you first hand about the problems experienced by our station in its attempt to control its music use and its licensing costs. Our experience provides an excellent example of the problems discussed by Mr. Atsinger that can result from the combination of ASCAP's refusal to identify its music, and the inequities of the per-program license.

I. **Attempts to Identify Licensed Music**

In 1991, my station began an effort identify the licensing status of the music it played. We were told by ASCAP that it would provide information on specific titles if a list was submitted to its New York office for review. In the fall of 1991, we submitted a list of about 40 compositions. It took more than five weeks to receive a response. The list was limited to the current status of the titles and did not include the date on which the titles would move into the public domain.

Mr. Chairman, we determined that this "service" was worthless to us. We simply could not identify the licensing status of the music we performed by waiting five weeks to receive forty titles. Our total repertoire is over forty thousand titles. Of that total, we regularly perform eight thousand titles; more than 1,800 titles per month. At that rate, it would have taken 200 lists, or more than 20 years, to identify our eight thousand titles. In this age of computerization, that is inexcusable.

We next sought to obtain access to ASCAP and BMI's computerized data bases of titles. Written requests were made to both organizations. Both ASCAP and BMI refused to grant us access to use their data bases.

The only other resources available to users for identification of ASCAP music are the ASCAP List of Members

and the ASCAP Symphonic Catalog. The latter document is seventeen years out of date, and does not include instrumental and chamber music. Even if a title is in the Symphonic Catalog, it may have long since passed into the public domain. The list of members is equally worthless, as it does not indicate what compositions have passed into the public domain, and does not distinguish the compositions of a composer that may have licensed only part of his or her repertoire to ASCAP.

Based on ASCAP's and BMI's refusal to provide meaningful identification of its repertory, we had no choice but to abandon our efforts as a waste of time. We simply could not dedicate the resources to fruitless effort.

II. Our Experiences with the Per-Program Licenses

In spite of our inability to learn about the license status of the music we performed, we were firmly convinced that the overwhelming majority of our music is in the public domain. After all, most of the composers whose works we perform died before this century. Thus, despite the uncertainty and the inability to control our performances of licensed music, we decided to use the per-program form of license issued by ASCAP and BMI.

When we went back to look at the results of 1992 we were shocked. Based on our best understanding of ASCAP's classical repertory, we estimated that approximately 20% of

our programs contained ASCAP music. This would have led to a license fee of about 75% of the fee we would pay under the blanket. While even this would have been unreasonably high for that amount of music, we figured it was better than paying the blanket license fee.

Under the per-program licenses we were required to send ASCAP and BMI reams of monthly music reports generated by our computer system. In this we were fortunate. At least our play list is computerized. Before computerization, it required a substantial portion of the time of one employee merely to coordinate our per-program licenses. In our reports we identified approximately 22% of our weighted hours as containing ASCAP music.

When ASCAP sent our monthly music reports back, we discovered they had claimed that 30% of our weighted hours contained ASCAP music. As a result, after all of the effort, we wound up paying more than 99% of the amount we would have paid under the blanket license as a per-program fee in 1992.

ASCAP has not told us the basis for their claims, so we have not determined if they are correct. My Program Director has advised me that at least one of the titles that had been identified as being in the public domain on our 1991 list of 40 titles, Rachmaninoff's popular piano concerto number 2, was claimed by ASCAP during 1992. Even if ASCAP's 1992 claims were correct, it highlights the difficulty that the

current system presents for the correct identification of licensed music. If, on the other hand, ASCAP is wrong, it indicates a different, and in some ways more serious problem of false claiming.

We have also used a BMI per-program license. BMI's classical music repertoire is so small that only a little more than 2% of our programming periods contain any BMI music. And it is reasonable to expect that these programs contain only one BMI title. Thus, we use BMI music at a rate of less than one fiftieth of a popular music station. Nevertheless, in 1992, for example, we paid more than 31% of what we would have paid under the blanket license. Again, our fee is much higher than our use would justify.

III. Our Music Use

Based on a two month sample of the music reports returned by ASCAP, we have been able to estimate that approximately 17% of our repertory has been claimed by ASCAP. Even assuming all of the titles claimed by ASCAP are ASCAP's, this is a far smaller percentage of ASCAP music than the 50% that most popular music stations perform. Nevertheless, our fee was just the same as if we used ASCAP music in every one of our programs.

Under a rational system of music licensing, we would be able to control our music use in order to control our licensing fees. Under a rational system of music licensing,

the use of a single ASCAP title in 30% of our program hours would not cost us as much as the use of ASCAP music 24 hours a day. The system that exists today is simply not rational.

* * *

Mr. Chairman, the current system of music licensing simply does not offer a fair alternative to stations like ours that use limited amounts of copyrighted music. Despite our attempts, we have been stymied in our efforts to learn who controls the music we use. Until we have that information, we can not realistically determine whether the copyrighted music is worth performing, whether we should perform more music from the public domain, or whether we should seek alternative sources of programming. This is a choice that every consumer should have the right to make. After this experience, I can understand why so many stations simply throw up their hands and take the blanket license.

I believe classical music stations play an important role in the culture of our nation. But we are neither rich nor powerful, and there are not many of us. Even joined with other formats, we can not spend millions of dollars to obtain licensing reform in the courts. Nor should we have to.

All we ask is that we be have the opportunity to pay for what we play on a reasonable basis, and that we be given the opportunity that all other consumers enjoy -- to decide on our own what and how much of somebody's product we want to buy.

Thank you for your attention. I urge you to consider the recommendations set forth in Mr. Atsinger's testimony.

Mr. HUGHES. Mr. Gomez, welcome.

STATEMENT OF EDUARDO GOMEZ, PRESIDENT, KABQ RADIO STATION, ON BEHALF OF THE AMERICAN HISPANIC-OWNED RADIO ASSOCIATION (AHORA)

Mr. GOMEZ. Thank you, Mr. Chairman and members of the committee.

My name is Eduardo Gomez, and I am here officially representing the American Hispanic Owned Radio Association which represents the licensees of many of the Spanish-language radio stations in the United States. Unofficially, I would like to think that I'm also representing the other several hundred full-time and part-time Spanish languages in the country.

At a meeting of the AHORA board this past weekend in Los Angeles, the board asked me to convey our gratitude to the committee for allowing us this opportunity to talk about a problem that has plagued many of us for a long time, and in addition, we are pleased to be here in support of the national religious broadcasters, who have faced similar problems.

At this point, Mr. Chairman, I would like to deviate from my written statement, and try to comply with your request to be brief.

Mr. HUGHES. Thank you, Mr. Gomez.

Mr. GOMEZ. In summary, for us, the Spanish broadcasters, regarding music licensing, there are two primary problems.

Blanket licenses—stations pay a percentage of their revenues to each music licensing society in exchange for access to their respective music catalogs. This system generates from $8 million to $10 million, we believe, from Spanish-language broadcasters, annually.

The blanket licensing system is unjust because Spanish-language broadcasters use only a fraction of the society's repertoire. The alternative system, per-program licensing, as you've heard, applies almost exclusively to nonmusic stations.

Repertoire access—the music societies do not allow the broadcasters access to their Spanish-language repertoires. Hence, the stations have no way of assessing which societies carry the bulk of the repertoire, which they utilize, or if there is overlap in repertoires, thus, giving the stations the ability to choose which society to access.

And at this point, I would like to reiterate Mr. Atsinger's comment about SESAC. The smallest of the three licensing societies has recently announced that the technology to monitor which songs stations play, and thus the ability to charge them for only what they play, has long been available.

Regarding the collection and distribution of funds by music societies, Spanish-language composers are receiving only between 25 and 30 percent of the funds, and perhaps even less, contributed by Spanish-language broadcasters. The rest of the funds are being distributed to non-Hispanic composers, in spite of the fact that these broadcasters do not use their music.

The American Hispanic Owned Radio Association, AHORA, proposes several remedies. First, Congress should launch a formal and full-scale investigation of the industry to ferret out and correct all inequities. During said investigation, radio stations would continue to pay their licensing fees into a trust fund.

Second, a system of pay-for-what-you-play should be imposed. New technology allows for an exact monitoring of what songs stations play, thus making this system workable.

Third, the music licensing society should be required to make their repertoire lists available to all broadcasters.

Fourth, music societies should be prohibited from commingling funds paid by Spanish-language broadcasters. These funds should be kept separate and distributed only to those composers utilized by the broadcasters.

Mr. Chairman, the United States of America is the only country in the world in which more than one music licensing society is permitted to exist. This is in keeping, of course, with our free enterprise system.

However, as this system breaks down, stations are forced to pay blanket licenses to all three societies, without the ability to shop for the best bargain and take advantage of a competitive market.

Moreover, in the case of composers of Spanish-language works, the entire free enterprise system is also not working, because they are being deprived of payments for their compositions.

Thank you very much.

Mr. HUGHES. Thank you, Mr. Gomez.

[The prepared statement of Mr. Gomez follows:]

Prepared Statement of Eduardo Gomez, President, KABQ Radio Station, on Behalf of the American Hispanic-Owned Radio Association (AHORA)

Thank you Mr. Chairman, Members of the Committee. My name is Eduardo Gomez and I am here officially representing the American Hispanic-Owned Radio Association ("AHORA"). AHORA represents the licensees of many of the Spanish language radio stations in the United States. Unofficially, I would like to think that I am also representing the other several hundred operators of full-time and part-time stations. At a meeting of the AHORA Directors this past Saturday in Los Angeles, the Board asked me to convey our gratitude for this opportunity to speak about a problem that has plagued many of us for a long time. In addition, we are pleased to be here in support of the efforts of the National Religious Broadcasters who have been faced with similar problems. The difficulties I refer to stem from the system in this country of music licensing and the collection and distribution of royalties by the American music licensing societies.

There are three substantive concerns that have been expressed by members of AHORA and other Spanish-language broadcasters. These concerns stem from the blanket licenses which all broadcasters must obtain in order to broadcast music over the airwaves. Under the current system of music licensing, music societies such as ASCAP, BMI and SESAC basically provide two forms of licenses. One is a "per program" license, which is primarily for non-music stations; and the other is a "blanket" license. The per program license imposes very strict and onerous reporting requirements whereby the station logs every musical piece aired. Because of these substantial reporting requirements, the per program license is not practical for stations that program most of their airtime with music. For music stations, the only alternative is the blanket license whereby the stations must pay a percentage of their revenues to each music licensing organization in exchange for access to the entire music catalogue of each licensing organization.

The problem with the blanket license is three-fold. First, there is a basic concern that the music being played by many Spanish-programmed stations constitutes only a small percentage of any given society's repertoire and that, therefore, it is unfair for Spanish stations to have to pay a percentage of their meagre revenues to each society for a blanket license when only a small percentage of the total repertoire is actually used. Second, the societies will not allow public access to their Spanish-language repertoire and therefore prevent radio stations

from making a rational business judgment as to whether to play music from one society or the other (thus forcing, out of lack of knowledge, the payment of blanket licenses to all three societies). The third concern has to do with the distribution of funds by the societies. It is our understanding from discussions with former employees of ASCAP and BMI that the societies co-mingle the funds they collect from Spanish-language stations with funds collected from general market stations. As a result, there is no accountability to the Spanish music composers and publishers for the royalties paid by the stations that play their music. There are horror stories of up-and-coming Latin music composers producing hit songs which enjoy wide airplay, but receive no royalties from public performances. Instead, it appears that most of the funds collected from Spanish-language stations are distributed to non-Latino composers.

In response, the music societies readily say that if a broadcaster does not want to operate under the blanket license, the alternative is the so-called per-program license. As mentioned, however, the per-program license is only suited for non-music stations. For music stations, the per-program license is more expensive than the blanket license because of the paperwork and monitoring required. In fact, the per-program license is more difficult for all except stations with talk-news formats. For years, stations have said that they would be willing to pay for an equitable "pay for only what you play" license. In response, however, the music licensing societies

have said that such a license was unworkable. However, SESAC, the smallest of the three licensing societies, has recently announced that the technology to monitor which songs stations play, and thus the ability to charge them for only what they play, has long been available.

On the second issue, many AHORA members, as well as other Spanish-language broadcasters have begged and pleaded with the major societies for their lists of Spanish titles and composers. However, the music societies refuse to respond. It is not in their best interest to furnish the catalogs of their repertoire lists. It would not do to release the lists of licensed Spanish language compositions because that would enable Spanish-language stations to "shop around" between the music societies. Under the inequitable status quo, each society gets a percentage of each station's revenues no matter how much of that society's repertoire is publically performed. This provides each society with guaranteed income no matter how much inventory it sells. That is a pretty good deal for them.

This brings us to our third point, the distribution of funds to the proper publishers and authors. Informal surveys have shown that among all Spanish-language radio stations, about 8 to 10 million dollars are paid annually to the societies. From further investigation, only about 25% to 30% of that figure can be accounted for as payments to Spanish-language composers and publishers. Because the money is not kept separate, there is no accountability. What happens to the remainder? A poll by AHORA

members of local Latin music composers whose music has been aired during any given period indicates that very little, if any, money ever gets into the hands of those local composers. Moreover, AHORA stations note that the licensing societies rarely, if ever, audit stations operating under blanket licenses to see whose music is being played; the indication being that there is no effort to account for who is entitled to royalties. And on further investigation, many local Latin music composers themselves never even heard of the licensing societies and have no notion as to how to join one and take advantage of the payments made by radio stations.

The conclusion of all this is that the performing rights societies in the United States are operating in a vacuum, on their own with nobody to protect the interests of the Spanish-language station operator and composer. The current societies protect the interests of their longtime general market members and the hierarchy which has been created over the years. If stations fail to pay the percentage of revenues, the societies are quick to file copyright infringement actions. It is interesting to note that ASCAP "promotional" material for Spanish stations stresses the liability of non-payment, rather than the benefits of payment. If the money paid by Spanish-language stations is not going to composers of Spanish-language musical compositions, why should we have to be licensed by these societies.

It is the opinion and hope of AHORA members that Congress launch an investigation into all of these disparities and inequitable practices of the performing rights societies. Moreover, AHORA would propose that radio stations be allowed to pay their licensing fees into a trust fund while this investigation is being carried on. Thereafter, the money from the trust can be dispersed in whatever equitable fashion is determined.

The United States of America is the only country in the world in which more than one music licensing society is permitted to exist. This is in keeping with our free-enterprise system. However, that system breaks down if stations are forced to pay blanket licenses to all three societies without the ability to shop for the best bargain and take advantage of the competitive market. Moreover, in the case of composers of Spanish-language works, the free-enterprise system is also not working because they are being deprived of payments for their compositions.

AHORA proposes several remedies. First, Congress should launch a formal and full-scale investigation of the industry to ferret out and correct all inequities. During said investigation radio stations would continue to pay their licensing fees into a trust fund. Second, a system of "Pay For What You Play" should be imposed. New technology allows for an exact monitoring of what songs stations play, thus making this system workable. Third, the music licensing societies should be required to make their repertoire lists available to broadcasters. Fourth, music societies should be prohibited from co-mingling funds paid by Spanish-language broadcasters. These funds should be kept separate and distributed only to those composers utilized by said broadcasters.

Mr. HUGHES. Your organization, Mr. Gomez, brings a rather unique and, I believe, invaluable perspective to our issues. Have you ever considered setting up a Spanish music performing rights society?

Mr. GOMEZ. Yes, we have. We have discussed it many, many times.

Mr. HUGHES. Is it practical?

Mr. GOMEZ. Probably not. For us, we have discussed it, and there are too many negatives. We would prefer to work through the current system, but it is just not fair to us. But that is a distinct possibility, Mr. Chairman. There is still discussion about it.

Mr. HUGHES. What suggestions do you have, then, if that's not a practical reality, to improve the amount of information available to stations that play Hispanic music?

Mr. GOMEZ. Well, I think the alternative or what we would like is to pay for only what we use, and that all of the moneys that we do pay go to Hispanic composers. That's basically our position.

Mr. HUGHES. Ms. Meloy, would you explain the concept of weighted hours a little more?

Ms. MELOY. Weighted hours differ from music played. When we say 17 percent of the music is ASCAP, we mean 17 percent of actual total music played.

When you go into weighted hours, if for instance, we play a piece that is 3 minutes within that hour, the whole hour, weighted by day-part to approximate revenue, is considered toward ASCAP.

The other thing that happens is, Mr. Chairman, if a piece—and we do play very long pieces, as you can imagine, on a classical station—starts at, let's say, quarter to 11, and ends at 5 after 11, then both the hour that it started and the hour it completed is considered an ASCAP hour. After weighting, those are what are called weighted hours. Any time a piece of ASCAP music is played, it triggers a weighted hour.

Mr. HUGHES. I see. If you cannot determine whether ASCAP has a particular piece in its repertoire, how do you make a determination that it's covered?

Ms. MELOY. At this point in time, Mr. Chairman, we cannot. We play what we feel is just appropriate for the music station and for the listening audience.

However, again, as we stated, such things as Rachmaninoff's piano concerto, which at one time, they stated was in the public domain, they are currently claiming, and it is very difficult for us even to judge, because of the different results which we have gotten from ASCAP directly.

Mr. HUGHES. Mr. Atsinger, a while back, religious broadcasters filed an antitrust suit against ASCAP, called *Alton Rainbow*. That suit was settled, back in 1984.

Mr. ATSINGER. Yes.

Mr. HUGHES. How is that suit relevant to the issues before the committee today?

Mr. ATSINGER. Well, I think it demonstrated that an antitrust remedy for users that feel that they have not been offered a reasonable alternative—that the antitrust road or remedy simply is not a practical one, and does not exist.

I was not directly involved at the time that those broadcasters initiated that action. It was made a class action. So because it was elevated to a class action, some of our stations would have been included. But we were not active in initiating that suit.

Since my involvement with the committee, I have suggested that we try to work through the rate court, and try to use the existing mechanism and see if we can't get some relief in that direction. That seemed to be more practical. It hasn't proved to be much less expensive.

It's my understanding that the television interests have expended over $10 million with the first suit that was ever decided in that court to determine what a fair fee is. That was decided 43 years after this court was established as a safety valve—well, some of that balance that you talked about yesterday.

It was originally thought that if a court were established, and users could apply to that court, that would provide some balance and some relief. The fact of the matter is, ASCAP has worked with this system for 40-plus years. They understand it far better than the users do. It's in their backyard. They know the ropes and they are very, very good at litigation. It's an unlevel playing field with particularly a small user group like us.

And if an individual station owner tried to apply, that would be impossible. If a group of even 400 stations tried to go to the rate court, which we are doing, it's very, very challenging.

If we can build upon the record that the TV industry created after 10 years and $10 million, which still isn't over, we would have a chance. We hope we can.

Even the Radio Music License Committee, which is far larger than our committee, could probably not sustain the kind of litigation expenses that would be required to go to the rate court.

So when we say that ASCAP specifically has circumvented the provisions of the consent decree, they have learned how to neutralize it, they've been pretty good over the last 43 years, and we still do not have a usable per-program license.

You asked Mr. Gomez if it would be practical to set up a Hispanic music licensing society. I would submit that it would be, if there were usable per-program licenses available from the other organizations. Because if not, and he set up his music licensing collective for Hispanic stations, all he would do is create another organization that the Hispanic stations would have to pay. They would not decrease their ASCAP or BMI fees, for all of the reasons I outlined.

First of all, the stations can't determine, because ASCAP and BMI won't cooperate, who controls what music. But beyond that, the license that they offer, the per-use or per-program license, is not a practical license for the limited user of their product. They have the weighted hour concept, which is really a little more complicated than we've discussed here. That results in—a generalization would be this. If 20 percent of your music, for example, was ASCAP music, you could very easily pay as much as you would pay under the blanket license. So there is no real incentive to find alternate sources of licensing. Most stations just take the blanket license.

On the administrative burden, Cathy Meloy mentioned the fact that they submit reams of paper. What it really amounts to is that you have to log extensive information on every musical selection you play, every hour, every day, 7 days a week, 24 hours a day, 30 days a month, and send it to them, and they analyze it, and then decide what the fee is going to be. It's an enormous burden. A sampling system would be easier.

Mr. HUGHES. I take it from your testimony, and also that of Ms. Meloy, that you have reason to believe that they have an automated data base today. What is your basis for making that suggestion?

Mr. ATSINGER. We are in litigation with the rate court now, and there are certain sensitive issues that I'd like to confer with our counsel who is here, who represents the committee, if you don't mind.

Mr. JOSEPH. Mr. Chairman, that information has been provided in discussions with the committee, with ASCAP and BMI, and it has also, to my knowledge, been provided to us by people who have formerly worked for ASCAP and BMI. I don't believe that ASCAP or BMI deny that they have a computerized data base.

Their testimony yesterday, as I understood it, claimed that the formats are different and, in fact, the purpose of those data bases is different. They've been used for distribution purposes, their internal surveys. But the existence of the data bases, I don't believe, has been denied.

Mr. HUGHES. What's your response to their suggestion that formats are different, and they wouldn't be of any use?

Mr. JOSEPH. My response is that they have the data bases that they use for their own purposes, with the same information users want. Changing the format of the data bases shouldn't be a terribly difficult thing to do, and the data bases ought to be available to users in the same way that ASCAP and BMI use them for their own purposes.

Mr. HUGHES. Would you identify yourself, for the record.

Mr. JOSEPH. I'm sorry, Mr. Chairman. My name is Bruce Joseph of Wiley, Rein & Fielding. I'm counsel to the NRB Music License Committee.

Mr. HUGHES. Mr. Joseph, thank you very much.

Mr. Gomez.

Mr. GOMEZ. I would just like to comment that we, in the past, have begged and pleaded for our list, for the Spanish-language list.

We are told that they are not separated from their regular data base, and that if they furnished us their entire list or repertoire, the entire catalog, that it would fill a room this big, and therefore, it is impractical for them to furnish it to us. But I believe that they are computerized.

Mr. ATSINGER. I could also shed another bit of information on that.

Under both per-program licenses of ASCAP and BMI, we are required to log extensive information—the title, the composer, the author, and quite a bit of additional information. Let me say this, I don't believe that they need that much information to determine whose copyright it is. I think they could achieve it much easier

than that, and I suspect that the format they use for internal purposes may be just fine for our purposes as well. But that would have to be explored to conclude that with certainty.

Mr. HUGHES. Well, your suggestion is, you believe that the reason it is not made available is because they prefer the blanket license, and all of their policies are couched in a fashion that would encourage you to acquire a blanket license.

Mr. ATSINGER. If you can't figure out what you are buying, and you are going to be sued if you infringe, you have no choice but to take both licenses.

Mr. HUGHES. But that's what you're suggesting to me.

Mr. ATSINGER. Yes, I am. And I think, quite frankly, Magistrate Dollinger said as much in his opinion, after a lengthy trial.

It's in my written statement, the exact quote of the magistrate on this very point. He concluded exactly the same thing, that it is not in their business interest to make the per-program license available, and that they would prefer to see people take the blanket license.

Mr. HUGHES. In the previous panel and in some of the suggestions yesterday, it appears that the witnesses did not believe that this could be remedied through negotiation; that ASCAP and BMI, in particular, are very comfortable with the present system, and the only thing that will change their policy is legislation, amending the copyright law. What's your view?

Mr. ATSINGER. Well, we tend to agree with that. We've been at this for a long, long time. I look at this whole area as almost like a "Dicken's Bleak House." I mean, I'll probably die before there is ever any real equity here.

Mr. HUGHES. We hope that doesn't happen.

Mr. ATSINGER. Well, I hope so, too. But the TV people have spent a lot of money, they've been at it for a long, long time. They have the money, and it may be a strain for them. But we agree with them.

Mr. HUGHES. What's your view, Ms. Meloy?

Ms. MELOY. I would agree 100 percent. You know, I think it is definitely in ASCAP's and BMI's interests to have users to be blanket licenses, and the licenses we want are not in their interests. But, again, when a station such as ours, Mr. Chairman, pays 99 percent, and we're only playing 17 percent of their play list, I challenge the system, and I say that it is not a rational system.

Mr. HUGHES. Mr. Gomez.

Mr. GOMEZ. The negotiating process is there, and they explain to you how it works and what we should do, but nobody really believes that there would be any gain.

Mr. HUGHES. In other words, you'd like to head up a negotiating team with the ammunition they have?

Mr. GOMEZ. We have never requested that, officially, but we would probably consider that.

Mr. HUGHES. Well, thank you. You've been very, very helpful to me, as have all our witnesses within the last 2 days. It's a very, very interesting, intriguing area. It's rather complex, and we've got a lot of very good suggestions. It's my intent that we will attempt to address what I believe are some major problems.

Thank you very much. That concludes the hearing for today, and the subcommittee stands adjourned.

[Whereupon, at 12:05 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIXES

APPENDIX 1.—H.R. 3288, A BILL TO AMEND TITLE 17, U.S. CODE, TO CREATE AN EXCEPTION FROM COPYRIGHT INFRINGEMENT FOR CERTAIN PERFORMANCES IN PLACES OF PUBLIC ACCOMMODATION

103D CONGRESS
1ST SESSION

H. R. 3288

To amend title 17, United States Code, to create an exception from copyright infringement for certain performances in places of public accommodation.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 14, 1993

Mr. THOMAS of Wyoming (for himself and Mr. PASTOR) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 17, United States Code, to create an exception from copyright infringement for certain performances in places of public accommodation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Public Accommodations Exception Act of 1993".

SEC. 2. EXEMPTION FROM COPYRIGHT INFRINGEMENT.

Section 110 of title 17, United States Code, is amended—

(1) by redesignating paragraph (10) as paragraph (11); and

(2) by inserting after paragraph (9) the following:

"(10) communication of a transmission, by radio or television, embodying a performance or display of a work by the public reception of the transmission on a receiving or recording apparatus in a restaurant, tavern, or other commercial establishment serving food or drink, the performance of which is incidental to the main purpose of the restaurant, tavern, or other commercial establishment, unless a direct charge is made to see or hear the transmission.".

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Appendix 2.—Rebuttal Statement of American Society of Composers, Authors and Publishers (With Attachments), in Response to Testimony on February 23–24, 1994

The American Society of Composers, Authors and Publishers (ASCAP) respectfully submits this statement to address issues raised by the Chairman and members of the Subcommittee, and to respond to the testimony given by music users and others who appeared before the Subcommittee at the oversight hearings held on February 23-24, 1994.

Introduction

In his testimony at the hearing, ASCAP's President Emeritus, Morton Gould, observed that the Subcommittee was unlikely to hear that any music user believed he was paying too little for the right to perform ASCAP's members' copyrighted music. His prediction was accurate. Although a number of the witnesses expressed their "support" for the principle of fair compensation for use of copyrighted works, at bottom, all said that they should either pay less or nothing at all. And,

unfortunately, they did so through testimony containing numerous misstatements of fact.

In addition, the Chairman and members of the Subcommittee raised serious issues which should be addressed. Accordingly, we shall first deal with those issues which the Chairman and the Subcommittee have indicated are uppermost in their minds -- the standard for uses by means of communication of transmissions in public establishments under 17 U.S.C. § 110(5), the desire for on-line access to information concerning ASCAP's repertory, and the question whether arbitration of rates would be a good idea. We will then turn to correct some of the more egregious misstatements by users who testified.

Because the focus of these hearings involved practices and issues that arose under § 110(5) of the Copyright Act, we believe it would be helpful to complete the record with the views of those who were closely associated with the creation of this provision of the law. For example, the Honorable Barbara Ringer, former and now Acting Register of Copyrights, might be able to shed some light on the context in which this language was developed and whether it has met its original expectations or has created any unanticipated problems.

Negotiation Concerning § 110(5) and
Licenses for General Establishments

At the hearing, ASCAP's representatives expressed the Society's strong desire to sit down with user groups representing "general establishments" (such as bars, grills, restaurants, taverns and nightclubs) and discuss the proper standard for the § 110(5) exemption specifically. After the hearing, ASCAP renewed that call in a letter sent to these users' representatives. A copy is attached as Exhibit A.

It is ASCAP's hope that such a meeting can take place under the Subcommittee's auspices. ASCAP's position is straightforward and was expressed at the hearing: We believe that it would be useful to reach agreement on a uniform standard for exempt and non-exempt uses of music by means of radio and television receivers in general establishments. Such an agreement would minimize disputes and litigation. We hope the meeting we seek can be quickly arranged.

We also would be happy to meet with these users' representatives and discuss any other licensing matters of concern.

On-Line Access to ASCAP Repertory Information

As we testified, ASCAP has for some time been looking into making information about our repertory available to users, members, and the general public, through access to an on-line computer system. Before the hearings, ASCAP had determined to do just that. This is a costly undertaking and we have had to examine it thoroughly. We have chosen a system, and work on it has progressed to the point where ASCAP is about to begin implementing it. Obviously, there are many matters that have to be worked out, such as system security and covering its costs. We anticipate that the system will be tested very soon and will be up and running in a matter of months.

In sum, ASCAP agrees with the Subcommittee that such on-line access is a good idea, and had undertaken to put such a system in place prior to the Subommittee's hearings.

Rate Arbitration

The question whether there should be some sort of compulsory arbitration of disputes between the performing rights organizations and music users was raised at the hearing. It was unclear as to whether arbitration was being advanced as a desirable procedure to determine reasonable license fees, to resolve disputes under existing

licenses, or for both purposes. In any event, ASCAP believes that compulsory arbitration is undesirable.

The Subcommittee heard testimony as to the procedure available to any music user for determination of a reasonable fee for an ASCAP license. Essentially, Section IX of the ASCAP Consent Decree allows any user to obtain a license by requesting one and prescribes a sixty-day negotiation period following which the user can apply to the United States District Court for a determination of the appropriate license fee. The Consent Decree contemplates that such proceedings would be carried on by groups representing either entire music-using industries or large segments of such industries. That is precisely what has transpired in the 44 years since the amended decree was entered.

The broadcasters who testified at the hearings may have left the Subcommittee with the impression that the ASCAP fee determination procedures have failed to provide the relief contemplated by the decree.[1] Quite to the

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[1] Just as was the case with respect to the television broadcasters who sought a legislative remedy to their dispute with ASCAP -- the so-called "source-licensing" legislation sought in 1985 -- two of the broadcasters who testified before the Subcommittee are parties to the pending New England Continental Media proceeding under Section IX of the ASCAP Consent Decree. The proceeding has indeed been a protracted one, but that is the broadcasters' fault, not ASCAP's. Their counsel, not ASCAP's, has sought and obtained discovery of thousands of documents and attempted to have the court determine fees that are different

contrary, with but three recent exceptions, ASCAP and a wide range of music users have successfully employed the procedures set forth in Section IX of the ASCAP Consent Decree many times in reaching long-term agreements on fees and other license terms. The industries involved in such successful proceedings include radio and television networks and stations, background music services and theme parks. In addition, many other music users have obtained licenses as products of negotiations conducted on an industry-wide basis -- hotels and motels, roller rinks and skating rinks, sponsors of conventions and trade shows, and dancing schools, to name just a few.

We strongly believe that a court proceeding to determine reasonable fees for all members of an industry is far preferable to arbitration for many reasons. First, if nothing else, arbitration generally requires the same degree of preparation as a court proceeding. There would thus be no cost savings.

Second, judges are trained to decide disputes; arbitrators generally tend to "split the baby." It is the prospect for decision by the court -- not compromise by arbitrators -- which impels settlement rather than

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from those already determined to be reasonable and non-discriminatory for the vast majority of commercial radio stations (including stations included on the original list of applicants in the New England Continental Media proceeding).

litigation. It forces both sides to be reasonable, while arbitration may not do so.

Third, ASCAP must apply its license rates, terms and conditions on a uniform and nationwide basis among similarly situated licensees. ASCAP is compelled to do so by the Consent Decree, and would want to do so even if that compulsion did not exist. Nondiscrimination among similarly situated users is a necessity no reasonable person can deny.

But if each individual user could go to arbitration over rates, without the safeguards that the Consent Decree provides in empowering one Federal Court, with nationwide reach, to determine rate questions, the result could be chaos. Different arbitration panels could take different views of rate questions for similarly situated users. And we doubt that many users within a given industry would want their rates determined by arbitrators looking at some single user who might not be representative of their industry as a whole -- creators and copyright owners certainly (and quite reasonably) would not want that either.

Thus, and to put it bluntly, we do not believe that the interests of creators and copyright owners would be adequately protected by arbitration of rate questions. That protection does exist in the Federal Court.

To repeat, the question of reasonable rates is one that has, and should, be determined on industry-wide bases. Arbitration is not an adequate way of addressing that issue. The Consent Decree mechanism is.

* * *

We now turn to correct specific misstatements in the users' testimony.

Testimony: Music license fees cause a hardship to business owners.

Facts: No user who testified offered any factual support for the proposition that music license fees are unduly burdensome. No restaurant owner provided any information as to the relationship of his license fees to his gross receipts; nor did any broadcaster provide the Subcommittee with details as to the amount of their license fees as compared with their stations' revenues. Typically, license fees are a very small percentage of a business's grosses. For example, restaurant owners who employ mechanical music often pay only a few hundred dollars a year in ASCAP license fees, and radio broadcasters pay about 1.6% of their gross revenues for an ASCAP blanket license.

Testimony: H.R. 3288 would clarify § 110(5) of the law.

Facts: Quite to the contrary, as the Chairman observed, the term "incidental" is far from clear. One can well imagine others seeking exemptions from liability because their uses of copyrighted works are "incidental."

During the hearings, much was made of the distinction between so-called "sports bars" and other establishments where audio and audiovisual performances of music occur. But, can anyone doubt that during the recent Winter Olympics, television sets in sports bars throughout the country were showing the telecasts of Torvill and Dean skating to Irving Berlin's "Let's Face the Music and Dance" and Oksana Baiul's gold medal performance to tunes from "My Fair Lady" and "West Side Story"? These were hardly "incidental" performances of ASCAP's members' music.

The fact is that every "incidental" use of property which enhances the atmosphere of a restaurant or business -- whether a use of clean tablecloths or of music -- should be paid for. As Justice Oliver Wendell Holmes said, "If music did not pay it would be given up." Herbert v. Shanley Co., 242 U.S. 591, 595 (1917).

> Testimony: [O]wners of establishments have no recourse but to pay the fees or face litigation by the performing rights societies.

Facts: No restaurant or bar owner, or any other business owner, is compelled to use music to entertain

patrons or employees. Businesses employ music because they have determined that it enhances the environment in which products or services are sold or otherwise furnished to customers. When a nightclub owner decides to hire a band or a disc jockey, or to turn on a radio or CD player, he does so because he believes it will improve his business. The lawful, inexpensive, and only alternative to complying with the Copyright Law and paying license fees is to turn off the music. Interestingly, when asked why he simply did not turn off the music, one witness replied, "It's part of my business." That is precisely the point.

> Testimony: Payment of license fees results "in double and triple dipping payments to the performing rights societies."

Facts: The Copyright Law recognizes that multiple performances may occur when music is performed publicly. Thus, when a singer performs a song at a concert that is broadcast, there is a performance for the audience in the theater, a separate performance by the network carrying the broadcast, another performance by the affiliated station broadcasting the program to its viewers, another performance by the cable system feeding the telecast to its subscribers, and, finally, yet another performance when the cable subscriber is a restaurant or hotel that turns on multiple television sets in its lounge

area for the entertainment of patrons and employees. Each of these users is receiving a separate and distinct benefit for his or her performance of the music, and should pay a fair fee to the creators and owners of the musical property being used.

ASCAP's licenses for broadcasters are limited to the performances by the broadcasters. Excluded from the scope of those licenses are performances which take place through the reception of programs by users who entertain their patrons with those receptions. This means that the broadcasters and cable companies do not pay fees for the separate performances given by those who utilize receivers to entertain their patrons and employees. There is no "double" or "triple-dipping."

Testimony: ASCAP license agreements are back-dated.

Facts: Whenever ASCAP seeks to license a new prospect, the license offered is for a term commencing with the date of first contact -- the date that ASCAP first knows music is being used. Often, several months elapse before the license is executed because the user has delayed doing so. During that period, the user typically continues to use ASCAP music. Thus, it is fair that the user pay the fees that would have been owed had the license been executed promptly after it was first offered and so pay for

all his uses of the musical property which belongs to others.

Testimony: The fee schedule for an ASCAP license for restaurants, bars, nightclubs and similar establishments was dictated to the industry.

Facts: ASCAP modified its Rate Schedule for its General License Agreement in 1991. At the time, ASCAP's Director of Licensing, Barry Knittel, met with the Board of Directors of the National Licensed Beverage Association (NLBA) to discuss the proposed changes in the Rate Schedule. Mr. Knittel invited the members of the NLBA to participate in negotiations with ASCAP if they objected to the new rates, but that invitation was refused. That is hardly "dictating" rates to an industry. And, although the new Rate Schedule provided for an increase in license fees, the new license enables a licensee to offset the increase by paying the yearly license fee in advance. If the user does so, the net fee is decreased by 4%.

Testimony: ASCAP is not interested in meeting with the representatives of the restaurant, bar and nightclub industry to discuss the issues raised at the hearings.

Facts: As noted above, ASCAP representatives have in the past met with representatives of the industry, and stand ready to do so again. Following the last meeting between representatives of ASCAP and the NLBA, the parties

exchanged correspondence. From ASCAP's point of view, the door is wide open for a resumption of face-to-face discussions to attempt to resolve the industry's concerns.

> Testimony: The ASCAP license agreement provides that "if I do anything that interferes with their ability to do business in the state or region, they can revoke my license."

Facts: The license agreement contains a provision that enables either ASCAP or the licensee to terminate the license in the event of interference by a governmental entity with ASCAP's business activities. The provision is a reflection of ASCAP's experiences going back to the 1930's and 1940's, when several states enacted regulatory statutes (at the request of users) which made it difficult or impossible for ASCAP to carry on its licensing activities.

> Testimony: "The fee structure is rarely adhered to by the representatives of ASCAP and BMI. We know of 'deals' cut for reduced fees for chains, and in New Jersey, our association undertook a survey which showed wide fluctuation from the nationally set rates."

Facts: ASCAP has a single, uniform rate schedule for restaurants, bars, nightclubs and similar establishments, which provides for many categories of rates to fit each licensee's individual entertainment policy. Thus, while the fees paid for each establishment vary based on the user's operating policy, the rate schedule applies

equally to all. A copy of the license agreement and rate schedule is attached as Exhibit B. No variations -- whether reductions or increases -- in the applicable rate for a particular restaurant, bar or nightclub are permitted. Whatever the rate schedule calls for based on the establishment's entertainment policy is the fee charged. ASCAP would ask those who testified to furnish specific information to support allegations of special "deals," so that the circumstances can be investigated to determine whether there has been a breach of licensing policy.

> Testimony: "If the piano player [who performed at Panico's Restaurant] had been individually licensed and if incidental music had been exempted from licensing, [Mr. Panico] never would have had to expend the tremendous amount of money and time fighting [ASCAP]."

Facts: The witness who provided the story of Panico's Restaurant advised the Subcommittee that Panico's annual ASCAP license fee was $400 a year. The fact is that ASCAP representatives advised this user of the requirements of the Copyright Law, and of his own responsibility for performances by his piano player and by means of recorded music. Nevertheless, Mr. Panico decided he would take his chances, continued to furnish musical entertainment for his patrons without authorization, and broke the law. He was therefore sued for copyright infringement, and ultimately

paid a $5200 settlement. What he did was nothing more than theft of others' property -- a decision that defied not only the Copyright Law, but also the law of economics and practical common sense.

> Testimony: The New Jersey Restaurant Association's "efforts to have a meeting with ASCAP have been clearly not accepted."

Facts: This is not the case. On August 27, 1993, counsel for the New Jersey Restaurant Association (NJRA) wrote ASCAP requesting a meeting to "negotiate a standard billing and collection arrangement with ASCAP on behalf of each individual [NJRA] member." ASCAP responded by letter dated September 16, 1993, enclosing a copy of the current form of ASCAP license agreement for restaurants, nightclubs and similar establishments, and recounting the discussions between ASCAP and the Board of Directors of the National Licensed Beverage Association. ASCAP advised the NJRA that it would meet with it if NJRA provided ASCAP with certain information concerning those the NJRA represents. The information ASCAP requested included identification of the type of business engaged in by each NJRA member using music (whether restaurant, bar, tavern, package store, or other business); specification whether the music is performed by live, mechanical audio, or mechanical audio-visual means; and, of those NJRA members who use music, how

many were then currently licensed by ASCAP. In a letter dated October 15, 1993, counsel for the NJRA advised that the NJRA had little information responsive to ASCAP's requests, that what it did possess was "confidential," "and obviously we decline to provide this information to you at this point and time." Counsel for NJRA closed by requesting that ASCAP call to arrange a meeting to "negotiate a flat fee arrangement" for NJRA's members -- an arrangement which, whatever its merits or drawbacks, was hardly possible in the absence of the economic data requested. As previously noted, ASCAP has nonetheless offered to meet with NJRA representatives.

Testimony: ASCAP would like to establish the limits of the Section 110(5) exemption as it applies to large-screen televisions by litigation.

Facts: The fact is that there has never been a case in which a court has determined whether a particular size television receiver is beyond the scope of the exemption. Simply stated, although ASCAP's current policy has been to attempt to license establishments that employ single televisions with a screen size in excess of 36 inches, no litigation has been commenced against anyone who employs only a single television set because we recognize that the statute is imprecise. As previously noted, we would very much like to work out a uniform standard which

does not expand the current exemption, but which clarifies it for all parties.

We would also supplement our answer to the Chairman's question as to how ASCAP's over-36-inch screen "standard" for television sets beyond the ambit of the § 110(5) exemption came about. As we noted at the hearing, around 1988-1989, ASCAP examined current information regarding sales of television sets. What we neglected to mention was that the over-36-inch "standard" was negotiated, explicitly, with a significant user industry -- the American hotel and motel industry. In late 1988 and early 1989, when ASCAP was negotiating a new hotel and motel license with the American Hotel and Motel Association, the over-36-inch standard was agreed upon and written into the license's rate schedule. Thus, it was not arbitrarily chosen by ASCAP, as some witnesses would have the Subcommittee believe.

Testimony: The Rhode Island Hospitality Association cannot find out which establishments in Rhode Island are licensed by ASCAP.

Facts: ASCAP does not divulge the identity of its licensees, or the fees paid by individual licensees. The reason is simply that this is proprietary information both to ASCAP and to licensees -- most licensees do not want the information publicly divulged. But this does not

prohibit the Rhode Island association or any other trade association from canvassing their own members or restaurant and nightclub owners in their states, to determine whether they are ASCAP licensees (if those establishments want to answer the questions asked).

> Testimony: Requiring the American Choral Directors to pay license fees for public performances of copyrighted musical works at their regional conventions results in "double-dipping" because choral directors purchase sheet music and choirs from licensed colleges and universities provide the entertainment.

Facts: The witness apparently has a fundamental misunderstanding of the scope of copyright protection afforded copyright owners under the Copyright Law. For example, he believes that because choral directors purchase sheet music, they thereby obtain the right to perform that music publicly. That is not the law. Section 106 of the Copyright Act grants copyright owners separate rights, including the right to print and sell sheet music, and the right to perform copyrighted music publicly.

Similarly, the same entertainers may perform music in different venues. Each separate performance requires the authorization of the copyright owners and depends upon the scope of the license granted (unless the performance is exempt under the law, such as a performance in a classroom for teaching purposes at an educational

institution). In the case of ASCAP's college and university license agreement, negotiated with an Educational Task Force representing the college and university community, the license does not extend to the performances at issue. This means that when the choir of a university or college that is licensed by ASCAP performs off the campus, and the university or college has not arranged for the concert, a separate license is required, for the university or college has not paid for those performances (and would probably resist doing so).

> Testimony: When a choral group directed by a member of the American Choral Directors Association performs at a shopping mall, the choral group needs a license.

Facts: ASCAP's view has always been that the operator of a shopping mall who engages musical groups to perform in the public areas of the mall bears the responsibility for obtaining permission for such performances -- the groups do not. ASCAP has never sought to license the musical groups who furnish the entertainment, whether they be choral groups, high school bands, or professional musicians. In those few instances where musical groups themselves have sought and obtained ASCAP licenses -- barbershop quartets, for example -- ASCAP is happy to provide them.

Testimony: ASCAP believes that public schools should have licenses for performances of music and the only reason they do not is ASCAP's inability to police all the schools in the United States.

Facts: ASCAP does not license public elementary or high schools and has no plans to license such schools. Most performances in public schools are probably exempt under Sections 110(1) or 110(2) of the Copyright Act.

Testimony: The inability to identify all performances of copyrighted music by choral groups results in inequitable treatment of composers.

Facts: It is not only the countless performances given by choral groups that cannot be separately identified: it would be prohibitively expensive for ASCAP or anyone to track and identify the millions of separate performances of copyrighted musical works that occur each day throughout the United States. But this does not mean that ASCAP members are not fairly compensated through ASCAP. In conformity with the provisions of the ASCAP Consent Decree, and based on scientifically designed and statistically accurate sampling techniques, ASCAP surveys thousands of public performances and distributes royalties on the basis of the survey results. Fairness is assured in a number of ways -- for example, the Justice Department and the United States District Court exercise oversight and continuing jurisdiction over the ASCAP survey and

distribution system. And the court has engaged independent advisors to assist it in overseeing the administration of the survey and distribution system.

This argument is a sham: ASCAP's members are well able to take care of their own internal matters -- they do not need users to do so, especially where the users are simply using such supposed solicitousness as a device for seeking to avoid paying reasonable license fees.

> Testimony: Those who own and operate public facilities at which conventions and concerts are presented may be held vicariously liable for infringing performances of copyrighted music at such facilities.

Facts: ASCAP does not seek to license such entities. ASCAP recognizes that, except when the entities also promote and present the entertainment, the principles of vicarious liability embodied in the Copyright Law would not impose liability on an entity that merely owns or manages a convention facility or concert hall. It is precisely that distinction that led ASCAP to attempt to license those who present and promote conventions, trade shows, exhibitions and similar events. Indeed, the witness who testified on behalf of the American Society of Association Executives acknowledged that his organization, representing those who present and promote conventions and trade shows, was a participant in negotiations that

produced a uniform ASCAP license for members of his association.

> Testimony: ASCAP refuses to license convention centers, hotels and talent agencies for performances at conventions and similar gatherings.

Facts: ASCAP has not sought to license convention centers, hotels or talent agencies for performances occurring in the course of conventions, trade shows, exhibitions and similar events of which the center, hotel or agency is not the sponsor. But ASCAP has never refused to issue licenses to such music users. Indeed, under the Consent Decree, ASCAP is required to license convention centers, hotels and talent agencies if they are the users performing music and request licenses.

There are a large number of such events, and even larger number of convention centers, hotels and talent agencies involved with them. If ASCAP were to license these entities for events for which they were not the sponsors -- that is, to license this industry in some way other than that by which it has proceeded through agreement with industry representatives -- it is likely that fewer performances would be licensed overall; that license fees would have to be higher because of ASCAP's greater licensing costs; and that there would be many more infringing performances of copyrighted works.

Testimony: ASCAP offered members of ASAE amnesty which was deceptive and characterized by lack of knowledge of whether copyrighted music was performed, threats of maximum fines of $20,000, and demands for licenses.

Facts: The Music Licensing Task Force, of which ASAE was a leading member and with which ASCAP negotiated the current form of license agreement for sponsors of conventions and similar events, requested that ASCAP offer an added inducement to sponsors to enter into the new license agreement promptly. Accordingly, ASCAP agreed to the following "amnesty": for those who entered into the new license agreement on or before February 1, 1991, ASCAP, on behalf of its members, would not press claims for copyright infringement arising out of unauthorized performances of ASCAP's members' music occurring at events prior to January 1, 1991; and if such sponsors had previously signed ASCAP license agreements and paid license fees in 1989 or 1990, ASCAP would credit the license fees already paid against fees due under the new agreement for 1991. It is remarkable that they now seek to depict the very thing they wanted, and which was a negotiated concession on ASCAP's part, as somehow evil.

Testimony: ASCAP refuses to provide information on license fees paid by comparable industries.

Facts: ASCAP's industry-wide license agreements (including rate schedules), such as its license for bars, grills, taverns, restaurants and similar establishments (attached as Exhibit B), local radio and television broadcasters, hotels and motels, background and foreground music service operators, and colleges and universities, are freely available. Information about the license fees paid by particular users, however, is proprietary and confidential, as previously noted.

But more to the point here, there is no industry "comparable" to that of the sponsors of conventions and similar events. These events vary in size, number of locations at which they may take place, and the manner in which music is performed in conjunction with them. Because ASCAP does not offer a license agreement in any industry comparable to this industry, ASCAP has no information on license fees paid by "comparable" industries.

Testimony: ASCAP refuses to license exhibitors at conventions.

Facts: ASCAP has not sought to license the thousands of exhibitors who participate in conventions, trade shows, exhibitions and similar events, but ASCAP has never refused to issue licenses to such music users. Indeed, under the ASCAP Consent Decree, ASCAP is required

to license exhibitors if they are the users performing music and request licenses. The fact is, however, that except for a handful of exhibitors who have sought such licenses at the behest of convention and trade show exhibitors who have broken the law and been sued for copyright infringement by individual songwriters or publishers, exhibitors have expressed no interest in obtaining ASCAP licenses.

> Testimony: An ASCAP per program license is designed to enable radio stations to pay only for the ASCAP music they use.

Fact: Like the "blanket" license for broadcasters available under the ASCAP Consent Decree, the "per program" license affords the licensee access to the entire ASCAP repertory. The terms refer to different ways of computing the applicable reasonable fee. Under the blanket radio license, the license fee is determined as a percentage of all of the station's gross revenues. Under the per program license, the bulk of the fee is determined as a percentage of revenue from programs that use ASCAP music. The per program license is intended for use by stations that use relatively little music (and, consequently, little ASCAP music). Some stations are able to confine their use of ASCAP music to a relatively small

portion of their broadcast hours, and thus may be able to reduce the fees they pay under the per program license.

Testimony: Religious, classical music and Hispanic radio stations licensed on the per program basis pay fees that are too high.

Facts: The broadcasters who testified protested that their license fees are too high, but did not disclose the amounts they pay to ASCAP in license fees, and the amounts their stations generate in revenues. The fact is that they pay less for an ASCAP per program license than they would pay under are ASCAP blanket license. Moreover, the fee provisions contained in the ASCAP per program licenses have been approved by the United States District Court in proceedings under the ASCAP Consent Decree. The blanket and per program fees were negotiated with an "All-Industry" committee of radio broadcasters. The fee levels negotiated were, in effect, averages for the entire industry, including stations which used a great deal of music and those who used less. Now, the broadcasters who appeared claim that they are not similarly situated with the stations whose representatives participated in the industry-wide negotiation of those court-approved licenses. That is their burden to carry in the New England Continental Media proceeding now pending in the federal court.

Testimony: It takes ten years and ten million dollars to obtain a determination of reasonable license fees under the ASCAP Consent Decree.

Facts: Mr. Atsinger testified that there has been only one instance in which the federal court has determined reasonable fees for an ASCAP license after a fully litigated proceeding (the Buffalo Broadcasting proceeding involving local commercial television stations). In fact, there have been two others -- one involving the Showtime cable television program service, and the other involving the ABC and CBS television networks. The latter proceeding was fully litigated in less than two years, at far less cost than the Buffalo Broadcasting case. If Mr. Atsinger and his fellow broadcasters would agree to submit to Judge Conner the simple question of whether their stations are similarly situated with all other commercial radio stations, and thus entitled to the same forms of blanket and per program licenses as are reasonable and non-discriminatory for the other stations, we would very quickly and inexpensively find out whether the existing licenses are "unfair" or their fees are "too high."

Testimony: A classical music station cannot determine whether the music it uses is in the ASCAP repertory.

Facts: Based on her own data, Ms. Meloy has received information from ASCAP as to more than 1800 titles

per month for more than three years -- a total of more than 21,600 identifications. Because her station's music use information is computerized, she surely must know by now which are in the ASCAP repertory. Why, then, is she unable to reduce the station's program hours that contain ASCAP music? The answer, we suspect, is that her program director has determined that the station's listeners want to hear ASCAP music. In consequence, the economic decision to provide desirable programming has overridden the economic considerations that might enable the station to achieve greater savings under the per program license.

Testimony: Hispanic composer members of ASCAP do not receive fair treatment.

Facts: Like all composer and lyricist members of ASCAP, Hispanic composers receive royalties in proportion to the performance of their works, determined in accordance with the court-approved ASCAP survey and distribution. As a matter of fact, ASCAP employs special monitors who are skilled in the identification of Spanish-language music to ensure that surveyed performances of such music on Hispanic radio and television stations are identified to the same degree as music used on all other stations. ASCAP values its Hispanic members very highly -- and ASCAP, more than virtually any other organization, treats all its members equally. Music is music, whoever wrote it. Again, this is

a case of users affecting a "concern" for ASCAP members when their real aim is to avoid paying properly for the musical property they are using.

Conclusion

On behalf of its members, the creators and copyright owners of American music, ASCAP appreciates the opportunity afforded by the Subcommittee's hearings to air the grievances expressed by those upon whom our members rely for their livelihoods. If the users involved truly recognize their obligations under the law, we have no doubt that their legitimate concerns can be worked out. We believe that, with the guidance expressed by the Chairman and the members of the Subcommittee, this desirable goal can be achieved.

Dated: March 28, 1994

ASCAP
AMERICAN
SOCIETY OF
COMPOSERS
AUTHORS &
PUBLISHERS

L. Barry Knittel
DIRECTOR OF LICENSING

March 11, 1994

Mr. William P. Fisher
Executive Vice President
National Restaurant Association

Mr. Joseph Johnson
Executive Committee Member
New Jersey Licensed Beverage Asso.

Ms. Debra A. Leach
Executive Director
National Licensed Beverage Asso.

Mr. James C. Simpson, III
President
National Licensed Beverage Asso.

Dear Friends:

At the oversight hearing held by the House Subcommittee on Intellectual Property and the Administration of Justice on February 23 and 24, 1994, ASCAP expressed its desire to meet with you, as representatives of general establishments such as restaurants and taverns, to discuss resolution of outstanding licensing issues. Those issues include, for example, the establishment of an agreed-upon standard for exempt uses of television sets which perform music.

ASCAP would be delighted to meet with you to pursue resolution of such outstanding issues. Please call me, and we can set up a date for a prompt meeting.

Sincerely,

L. Barry Knittel

L. BARRY KNITTEL

cc: Rep. William Hughes
Rep. Carlos Moorhead

EXHIBIT A

GENERAL LICENSE AGREEMENT–RESTAURANTS, TAVERNS, NIGHTCLUBS, AND SIMILAR ESTABLISHMENTS

Agreement between AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS ("SOCIETY"), located at

and
("LICENSEE"), located at as follows:

1. Grant and Term of License

(a) SOCIETY grants and LICENSEE accepts for a term of one year, commencing
and continuing thereafter for additional terms of one year each unless terminated by either party as hereinafter provided, a license to perform publicly at

("the premises"), and not elsewhere, non-dramatic renditions of the separate musical compositions now or hereafter during the term hereof in the repertory of SOCIETY, and of which SOCIETY shall have the right to license such performing rights.

(b) This license authorizes performances by means of "jukebox(es)" as defined in the Rate Schedule attached to and made a part of this Agreement.

(c) This Agreement shall enure to the benefit of and shall be binding upon the parties hereto and their respective successors and assigns, but no assignment shall relieve the parties hereto of their respective obligations hereunder as to performances rendered, acts done and obligations incurred prior to the effective date of the assignment.

(d) Either party may, on or before thirty days prior to the end of the initial term or any renewal term, give notice of termination to the other. If such notice is given the Agreement shall terminate on the last day of such initial or renewal term.

2. Limitations on License

(a) This license is not assignable or transferable by operation of law or otherwise, except as provided in subparagraph "1(c)" hereof, and is limited to the LICENSEE and to the premises.

(b) This license does not authorize the broadcasting, telecasting or transmission by wire or otherwise, of renditions of musical compositions in SOCIETY's repertory to persons outside of the premises, other than by means of a music-on-hold telephone system operated by LICENSEE at the premises.

(c) This license is limited to non-dramatic performances, and does not authorize any dramatic performances. For purposes of this Agreement, a dramatic performance shall include, but not be limited to, the following:

(i) performance of a "dramatico-musical work" (as hereinafter defined) in its entirety;

(ii) performance of one or more musical compositions from a "dramatico-musical work" (as hereinafter defined) accompanied by dialogue, pantomime, dance, stage action, or visual representation of the work from which the music is taken;

(iii) performance of one or more musical compositions as part of a story or plot, whether accompanied or unaccompanied by dialogue, pantomime, dance, stage action, or visual representation;

(iv) performance of a concert version of a "dramatico-musical work" (as hereinafter defined).

The term "dramatico-musical work" as used in this Agreement shall include, but not be limited to, a musical comedy, opera, play with music, revue, or ballet.

3. License Fees and Payments

(a) In consideration of the license granted herein, LICENSEE agrees to pay SOCIETY the applicable license fee set forth in the Rate Schedule annexed hereto and made a part hereof, based on "LICENSEE's Operating Policy." The term "LICENSEE's Operating Policy" shall mean all of the factors which determine the license fee applicable to the premises under the Rate Schedule.

(b) LICENSEE warrants that the Statement of LICENSEE's Operating Policy attached to and made a part of this Agreement is true and correct as of the date hereof.

(c) The current applicable license fee for the premises is annually, based on the factors set forth in the Statement of LICENSEE's Operating Policy.

(d) LICENSEE agrees to pay SOCIETY the license fee due hereunder in installments of one-third the applicable annual fee in advance on or before January 1, May 1 and September 1 of each year provided, however, that if LICENSEE does not otherwise owe SOCIETY any fees under this or any prior license agreement, and if LICENSEE pays the full annual fee on or before January 31st of any year, the applicable license fee for that year shall be reduced by 20%.

(e) LICENSEE agrees to pay SOCIETY a $25 service charge for each unpaid check, draft or other form of monetary instrument submitted by LICENSEE to SOCIETY.

(f) In the event LICENSEE shall be delinquent in payment of license fees due hereunder by 30 days or more, LICENSEE agrees to pay a finance charge on the license fees due of 1½% per month, or the maximum rate permitted by the law of the state in which the premises licensed hereunder are located, whichever is less, from the date such license fees became due.

EXHIBIT B

(g) In the event that LICENSEE's payment of fees under this Agreement causes SOCIETY to incur a liability to pay a gross receipts, sales, use, business use, or other tax which is based on the amount of SOCIETY's receipts from LICENSEE, the number of licensees of SOCIETY, or any similar measure of SOCIETY's activities, and (i) SOCIETY has taken reasonable steps to be exempted or excused from paying such tax; and (ii) SOCIETY is permitted by law to pass through such tax to its licensees, LICENSEE agrees to pay to SOCIETY the full amount of such tax.

4. **Changes in LICENSEE's Operating Policy**

(a) LICENSEE agrees to give SOCIETY thirty days prior written notice of any change in LICENSEE's Operating Policy. For purposes of this Agreement, a change in LICENSEE's Operating Policy shall be one in effect for at least thirty days.

(b) Upon any change in LICENSEE's Operating Policy resulting in an increase in the license fee, based on the annexed Rate Schedule, LICENSEE agrees to pay SOCIETY the increased license fee, effective as of the initial date of such change, whether or not written notice of such change has been given pursuant to subparagraph "4(a)" hereof.

(c) Upon any change in LICENSEE's Operating Policy resulting in a reduction in the license fee, based on the annexed Rate Schedule, LICENSEE shall be entitled to the reduction, effective as of the initial date of such change, and to a *pro rata* credit for any unearned license fees paid in advance, provided LICENSEE has given SOCIETY thirty days prior written notice of such change. If LICENSEE fails to give SOCIETY thirty days prior written notice, any reduction and credit shall be effective thirty days after LICENSEE gives SOCIETY written notice of the change.

(d) Within thirty days of any change in LICENSEE's Operating Policy, LICENSEE shall furnish to SOCIETY a current Statement of LICENSEE's Operating Policy and shall certify that it is true and correct.

(e) If LICENSEE discontinues the performance of music at the premises, LICENSEE or SOCIETY may terminate this Agreement upon thirty days notice, the termination to be effective at the end of the thirty day period. In the event of such termination, SOCIETY shall refund to LICENSEE a *pro rata* share of any unearned license fees paid in advance. For purposes of this Agreement, a discontinuance of music shall be one in effect for no less than thirty days.

5. **Breach or Default**

Upon any breach or default by LICENSEE of any term or condition herein contained, SOCIETY may terminate this license by giving LICENSEE thirty days notice to cure the breach or default, and in the event that it has not been cured within the thirty day period, this license shall terminate on the expiration of that period without further notice from SOCIETY to LICENSEE.

6. **Interference in SOCIETY's Operations**

In the event of:

(a) any major interference with the operations of SOCIETY in the state, territory, dependency, possesion or political subdivision in which LICENSEE is located, by reason of any law of such state, territory, dependency, possession or political subdivision; or

(b) any substantial increase in the cost to SOCIETY of operating in such state, territory, dependency, possession or political subdivision, by reason of any law of such state, territory, dependency, possession or political subdivision, which is applicable to the licensing of performing rights,

SOCIETY shall have the right to terminate this Agreement forthwith by written notice and shall refund to LICENSEE any unearned license fees paid in advance.

7. **Notices**

All notices required or permitted to be given by either party to the other hereunder shall be duly and properly given if:

(a) mailed to the other party by registered or certified United States Mail; or

(b) sent by electronic transmission (i.e., Mailgram, facsimile or similar transmission); or

(c) sent by generally recognized same-day or overnight delivery service,

addressed to the party at the address stated above. Each party agrees to inform the other of any change of address.

IN WITNESS WHEREOF, this Agreement has been duly executed by SOCIETY and LICENSEE

this day of , 19

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

By _____

Title

By _____

Title

(Fill in capacity in which signed:
(a) If corporation, state corporate office held;
(b) If partnership, write word "partner" under signature of signing partner;
(c) If individual owner, write "individual owner" under signature.)

STATEMENT OF OPERATING POLICY

OWNER _____

PREMISES _____

FULL ADDRESS _____

_____ ZIP CODE _____

TELEPHONE NO. _____ ROOM NO. _____

Indicate only applicable factors:

I. Seating Capacity _____

II. Live Entertainment		No. Days/Nights Per Week	Days/Nights Used (Circle)
A. Single instrumentalist	☐	_____	Su M Tu W Th F Sa
B. Two or more instrumentalists	☐	_____	Su M Tu W Th F Sa

III. Mechanical music not otherwise licensed		No. Days/Nights Per Week	Days/Nights Used (Circle)
A. Audio-only			
1. Compact discs		_____	Su M Tu W Th F Sa
2. Jukebox	☐	_____	Su M Tu W Th F Sa
3. Karaoke	☐	_____	Su M Tu W Th F Sa
4. Radio-over-speakers	☐	_____	Su M Tu W Th F Sa
5. Records	☐	_____	Su M Tu W Th F Sa
6. Tapes	☐	_____	Su M Tu W Th F Sa
7. Other_____	☐	_____	Su M Tu W Th F Sa
B. Audio-Visual		No. Days/Nights Per Week	Days/Nights Used (Circle)
1. Karaoke with video	☐	_____	Su M Tu W Th F Sa
2. Large-screen television	☐	_____	Su M Tu W Th F Sa
Approximate screen size:_____ inches diagonally			
3. Laser disc	☐	_____	Su M Tu W Th F Sa
4. Multiple televisions	☐	_____	Su M Tu W Th F Sa
5. Video cassette recorder	☐	_____	Su M Tu W Th F Sa
6. Video jukebox	☐	_____	Su M Tu W Th F Sa
7. Other (describe)_____	☐	_____	Su M Tu W Th F Sa

IV. Mechanical music furnished by licensed background music supplier ☐

Name and address of supplier: _____

_____

_____

V. Variables		No. Days/Nights Per Week	Days/Nights Used (Circle)
A. Act(s)	☐	_____	Su M Tu W Th F Sa
B. Dancing and/or disc jockey	☐	_____	Su M Tu W Th F Sa
C. Show	☐	_____	Su M Tu W Th F Sa
D. Vocalist(s)	☐	_____	Su M Tu W Th F Sa

VI. Charges made: $_____		No. Days/Nights Per Week	Days/Nights Used (Circle)
A. Admission	☐	_____	Su M Tu W Th F Sa
B. Cover	☐	_____	Su M Tu W Th F Sa
C. Entertainment	☐	_____	Su M Tu W Th F Sa
D. Minimum	☐	_____	Su M Tu W Th F Sa
E. Similar charge (describe) _____		_____	Su M Tu W Th F Sa

VII. Alternate or relief music provided by instrumentalist(s) ☐ No. Days/Nights Per Week _____ Days/Nights Used (Circle) Su M Tu W Th F Sa

VIII. Jukebox (see definition in Rate Schedule): Yes ☐ No ☐

A. Number of Jukeboxes:_____

IX. Music-on-hold: Yes ☐ No ☐

X. Number of rooms with musical entertainment _____

(If music is performed in more than one room, fill out and attach a separate Statement of Operating Policy for each room)

XI. If seasonal operation, indicate seasonal period: Opening date _____ Closing date _____

Rate based on above policy $ _____

(If more than one room, total rate for premises $ _____)

STATEMENT OF OPERATING POLICY

ROOM NO. _____

Indicate only applicable factors:

I. Seating Capacity _____

II. Live Entertainment		No. Days/Nights Per Week	Days/Nights Used (Circle)
A. Single instrumentalist	☐	_____	Su M Tu W Th F Sa
B. Two or more instrumentalists	☐	_____	Su M Tu W Th F Sa

III. Mechanical music not otherwise licensed		No. Days/Nights Per Week	Days/Nights Used (Circle)
A. Audio-only			
1. Compact discs		_____	Su M Tu W Th F Sa
2. Jukebox	☐	_____	Su M Tu W Th F Sa
3. Karaoke	☐	_____	Su M Tu W Th F Sa
4. Radio-over-speakers	☐	_____	Su M Tu W Th F Sa
5. Records	☐	_____	Su M Tu W Th F Sa
6. Tapes	☐	_____	Su M Tu W Th F Sa
7. Other_____	☐	_____	Su M Tu W Th F Sa

B. Audio-Visual		No. Days/Nights Per Week	Days/Nights Used (Circle)
1. Karaoke with video	☐	_____	Su M Tu W Th F Sa
2. Large-screen television	☐	_____	Su M Tu W Th F Sa
Approximate screen size:_____inches diagonally			
3. Laser disc	☐	_____	Su M Tu W Th F Sa
4. Multiple televisions	☐	_____	Su M Tu W Th F Sa
5. Video cassette recorder	☐	_____	Su M Tu W Th F Sa
6. Video jukebox	☐	_____	Su M Tu W Th F Sa
7. Other (describe)_____	☐	_____	Su M Tu W Th F Sa

IV. Mechanical music furnished by licensed background music supplier ☐

Name and address of supplier: _____

_____

_____

V. Variables		No. Days/Nights Per Week	Days/Nights Used (Circle)
A. Act(s)	☐	_____	Su M Tu W Th F Sa
B. Dancing and/or disc jockey	☐	_____	Su M Tu W Th F Sa
C. Show	☐	_____	Su M Tu W Th F Sa
D. Vocalist(s)	☐	_____	Su M Tu W Th F Sa

VI. Charges made: $_____		No. Days/Nights Per Week	Days/Nights Used (Circle)
A. Admission	☐	_____	Su M Tu W Th F Sa
B. Cover	☐	_____	Su M Tu W Th F Sa
C. Entertainment	☐	_____	Su M Tu W Th F Sa
D. Minimum	☐	_____	Su M Tu W Th F Sa
E. Similar charge (describe) _____		_____	Su M Tu W Th F Sa

VII. Alternate or relief music provided by instrumentalist(s) ☐	No. Days/Nights Per Week	Days/Nights Used (Circle)
	_____	Su M Tu W Th F Sa

VIII. Jukebox (see definition in Rate Schedule): Yes ☐ No ☐

A. Number of jukeboxes:_____

IX. Music-on-hold: Yes ☐ No ☐

X. Number of rooms with musical entertainment _____

(If music is performed in more than one room, fill out and attach a separate Statement of Operating Policy for each room)

XI. If seasonal operation, indicate seasonal period: Opening date _____ Closing date _____

Rate based on above policy $ _____

(If more than one room, total rate for premises $ _____)

RATE SCHEDULE

LICENSE FEES FOR CALENDAR YEAR 1994

This Rate Schedule applies to Bars, Grills, Taverns, Restaurants, Lounges, Supper Clubs, Night Clubs, Ballrooms, Dance Clubs, Discos, Piano Bars, Cabarets, Roadhouses and similar establishments

		LIVE MUSIC—SINGLE INSTRUMENTALIST						LIVE MUSIC—TWO OR MORE INSTRUMENTALISTS						NO LIVE MUSIC					
						Mech Music Audio-Only (C)	Mech Music with A/V (D)					Mech Music Audio-Only (C)	Mech Music with A/V (D)	Mech Music Audio-Only (C)			Mech Music With A/V (D)		
Seating Capacity (A)	No Days/ Nights Per Week	Base Rate	NO OF VARIABLES (B) (1)	(2)	(3)	Add	Add	Base Rate	NO OF VARIABLES (E) (1)	(2)	(3)	Add	Add	Base Rate	NO OF VARIABLES (F) (1)	(2)	Base Rate	NO. OF VARIABLES (F) (1)	(2)
75 & under	1	$ 212	$ 281	$ 373	$ 501	$ 82	$124	$ 281	$ 373	$ 501	$ 668	$ 82	$ 124	$ 191	$ 281	$ 373	$ 287	$ 422	$ 560
	2 3	293	386	513	686	106	159	420	561	747	993	106	159	212	386	513	319	528	170
	4 7	361	479	641	864	128	193	561	747	993	1331	128	193	233	479	641	350	719	963
76 150	1	281	373	501	667	117	175	373	501	667	887	117	175	274	373	501	412	560	753
	2 3	420	561	747	993	152	228	561	747	993	1331	152	228	305	561	747	458	842	1120
	4 7	561	747	993	1331	187	279	747	993	1331	1776	187	279	336	747	993	505	1120	1489
151 225	1	373	501	667	889	152	228	501	667	887	1192	152	228	359	501	667	537	753	1001
	2 3	561	747	993	1331	199	299	757	1001	1345	1786	199	299	399	747	993	598	1120	1489
	4 7	747	993	1331	1776	246	369	1001	1345	1786	2382	246	369	438	993	1331	658	1489	1996
226 300	1	464	620	827	1107	187	279	620	840	1121	1493	187	279	442	620	827	664	929	1240
	2 3	704	934	1248	1669	246	369	947	1261	1682	2240	246	369	491	934	1248	737	1402	1873
	4 7	934	1248	1669	2220	305	458	1261	1682	2240	2990	305	458	540	1248	1656	811	1873	2485
301 375	1	561	747	993	1331	221	331	757	1016	1354	1799	221	331	524	747	993	786	1120	1489
	2 3	840	1121	1493	1993	293	439	1146	1520	2030	2695	293	439	582	1121	1493	871	1682	2240
	4 7	1121	1493	1993	2649	361	540	1520	2019	2695	3595	361	540	639	1493	1993	960	2240	2990
376 450	1	655	876	1166	1554	257	385	887	1179	1576	2101	257	385	609	876	1166	916	1316	1750
	2 3	980	1318	1742	2323	341	512	1331	1776	2369	3150	341	512	676	1306	1742	1015	1959	2612
	4 7	1306	1752	2323	3094	420	630	1778	2369	3150	4204	420	630	744	1752	2323	1117	2627	3485
451 525	1	656	876	1166	1554	257	385	1016	1354	1809	2404	293	439	696	993	1345	1044	1489	2017
	2 3	980	1318	1742	2323	341	512	1527	2030	2709	3620	386	578	772	1493	2019	1158	2240	3029
	4 7	1306	1752	2323	3094	420	630	2030	2709	3608	4810	479	719	850	1985	2685	1274	2978	4029
526 600	1	656	876	1166	1554	257	385	1146	1577	2030	2709	326	489	727	1107	1520	1166	1660	2280
	2 3	980	1318	1742	2323	341	517	1717	2288	3047	4064	432	648	864	1669	2276	1297	2504	3413
	4 7	1306	1752	2323	3094	420	630	2288	3047	4064	5417	536	805	950	2220	3036	1425	3331	4555
601 675	1	656	876	1166	1554	257	385	1273	1692	2265	3011	361	540	861	1276	1692	1292	1839	2539
	2 3	980	1318	1742	2323	341	512	1914	2546	3396	4518	479	719	957	1845	2546	1434	2768	3819
	4 7	1306	1752	2323	3094	420	630	2546	3396	4518	6021	594	891	1053	2454	3387	1580	3681	5080
676 750	1	656	876	1166	1554	257	385	1399	1866	2486	3316	399	598	945	1345	1866	1418	2017	2800
	2 3	980	1318	1742	2323	341	512	2101	2799	3736	4974	527	791	1050	2019	2799	1575	3028	4198
	4 7	1306	1752	2323	3094	420	630	2799	3736	4974	6630	656	983	1155	2685	3736	1732	4028	5604
751 & over	1	656	876	1166	1554	257	385	1399	1866	2486	3316	432	648	1031	1459	2043	1546	2189	3064
	2 3	980	1318	1742	2323	341	512	2101	2799	3736	4974	572	859	1146	2193	3072	1718	3289	4608
	4 7	1306	1752	2323	3094	420	630	2799	3736	4974	6630	713	1069	1260	2919	4086	1890	4379	6130

(A) "Seating Capacity" for ballrooms, dance clubs, discos and similar operations means the total allowable occupancy of the premises under local fire or similar regulations, and shall not be limited to the total number of available seats, provided that if no such local fire or similar regulations are in effect, then "seating capacity" means 10 people per 100 square feet or portion thereof of the room(s) in which music is performed.

(B) VARIABLES (Applicable to single instrumentalist):
- Show or act(s) or vocalist(s)
- Admission, minimum, cover, entertainment or similar charge.
- Alternate or relief music (live) by a single instrumentalist. Music provided solely at the time of the show or act(s) shall not be deemed to be alternate or relief music.

(C) "Mechanical Music Audio-Only" means performances other than by live musicians, e.g., records, tapes, compact discs, karaoke, or similar media or by a radio-over-loudspeaker system licensable under the United States Copyright Law, but shall not include music presented by means of a music-on-hold telephone system or a jukebox (as hereinafter defined).

(D) "Mechanical Music Audio-Visual" means performances such as, for example, by means of a television with screen measuring greater than 36 inches diagonally, multiple televisions regardless of screen size, laser discs, video tapes, karaoke with video, or video jukeboxes. If performances are presented by both audio-only and audio-visual mechanical means, add only the applicable additional fee specified for "mechanical music audio-visual."

(E) VARIABLES (Applicable to two or more instrumentalists):
- Show or act(s).
- Admission, minimum, cover, entertainment or similar charge.
- Alternate or relief music (live) by any instrumentalist(s). Music provided solely at the time of the show or act(s) shall not be deemed to be alternate or relief music.

(F) VARIABLES (Applicable when there is no live music, to audio-only and audio-visual mechanical music):
Admission, minimum, cover, entertainment or similar charge.
- Dancing (patrons or performers), show or act(s) (including disc jockey, video jockey or master of ceremonies).

FEE FOR PERFORMANCES BY MEANS OF JUKEBOX(ES)

For purposes of this Agreement, a "jukebox" is a machine or device that is (i) employed solely for the non-dramatic performance of musical works by means of phonorecords, compact discs or similar medium and which is activated by insertion of coins, currency, tokens, or other monetary units or their equivalent; (ii) is located in an establishment making no direct or indirect charge for admission; (iii) is accompanied by a list of the titles of all musical works available for performance on the jukebox, which list is affixed to the jukebox or posted in the establishment in a prominent position where it can be readily examined by the public; (iv) affords a choice of works available for performance and permits the choice to be made by the patrons of the establishment in which it is located; and (v) for which neither a compulsory license nor a license from the Jukebox License Office nor a license from SOCIETY other than this license is in effect. For purposes of this Agreement, the term "jukebox" does not include devices commonly known as "video-jukeboxes," or any other audio-visual devices.

For performances given by means of jukebox(es), the annual license fee shall be $209 per jukebox.

FEE FOR PERFORMANCES BY MEANS OF MUSIC-ON-HOLD TELEPHONE SYSTEM

For performances given by means of a music-on-hold telephone system at the premises, the annual license fee shall be $156.

COMPUTATION OF FEE FOR MIXED POLICIES

1. Compute fee for the higher policy for the number of days/nights that the higher policy is in effect. The higher policy is the policy which generates the highest fee for any one day/night. If the higher policy is in effect for four or more days/nights per week, stop here: Your fee is the fee for the higher policy. If the higher policy is in effect for fewer than four days/nights per week, continue with steps 2 through 6 below to complete the computation of the fee for your mixed policy.
2. Note total number of days/nights entertainment is provided.
3. Compute fee for the lower policy using the total number of days/nights entertainment is provided under both the higher and lower policies.
4. Compute fee for the lower policy using the number of days/nights the higher policy is in effect.
5. Subtract fee computed in step 4 from fee computed in step 3.
6. Add fee computed in step 1 to fee computed in step 5 for total fee.

SEASONAL FEES

For seasonal licensees, the fees for periods up to four months of operation are 1/2 the annual license fee; for each additional month the fee is 1/12 the annual license fee. The seasonal license fee will in no case be more than the annual license fee.

FEE FOR OCCASIONAL PERFORMANCES

For policies in effect for any three or fewer days/nights per month, the fee is the applicable annual fee for the highest of such policies as if such highest policy were in effect for one day/night per week. For policies in effect for any six or fewer days/nights per calendar year, the fee is 1/3 the applicable annual fee for the highest of such policies as if such highest policy were in effect for one day/night per week.

ANNUAL LICENSE FEE FOR CALENDAR YEARS 1995 AND THEREAFTER

The annual license fee for each calendar year commencing 1995 shall be the license fee for the preceding calendar year, adjusted in accordance with the increase in the Consumer Price Index (National, All Items) between the preceding October and the next preceding October.

HOTELS AND MOTELS

Memorandum of Agreement between AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS (hereinafter styled "SOCIETY") and

(hereinafter styled "LICENSEE"), as follows:

1. SOCIETY grants and LICENSEE accepts for a period commencing as of and ending December 31, 1993 a license to perform publicly by means of live entertainment or mechanical music (as defined in paragraph 2), and by no other means, at or in any part or section of the hotel or motel known as

(hereinafter called "the premises"), and not elsewhere, non-dramatic renditions of the separate musical compositions copyrighted or composed by members of SOCIETY and of which SOCIETY shall have the right to license the performing rights.

2. This license is limited strictly to the premises. The license fee herein provided to be paid is based upon the performance of such non-dramatic renditions by live entertainment or mechanical means (as hereinafter defined) for the entertainment solely of such persons who may be present on or in the premises, and does not authorize the broadcasting, telecasting or transmission by wire or otherwise, of such performances or renditions to persons outside of the premises, and the same is hereby strictly prohibited unless consent of SOCIETY in writing first be had therefor by LICENSEE or by the person responsible for such broadcasting, telecasting or transmission; nor does this license authorize performances emanating from any point outside the premises or transmitted by any means to the premises in the form of background music services, wired music or in any other form or manner (except as specified herein), it being expressly understood, however, that if SOCIETY grants a license to such outside source authorizing it to supply its service to, and for reproduction or rendition at the premises, LICENSEE shall be authorized to render performances by such means at the premises without further payment to the SOCIETY therefor; nor does it authorize performance as part of an industrial or trade show, exposition or business presentation at the premises.

The term "mechanical music" as used in this Agreement shall mean music which is reproduced at the premises by means other than by live musicians who are performing at the premises, including, but not limited to, audio record or audio tape players, coin-operated phonorecord players (jukeboxes) (other than jukeboxes otherwise covered by the compulsory license provisions of 17 U.S.C. § 116), videotape players, performances in public rooms or guests' private rooms at the premises by means of pay or cable television, motion pictures, videotapes, or any similar means or method (whether transmitted by satellite or otherwise to the premises), or the reception and communication at the premises of radio or television transmissions which originate outside the premises, all subject to the limitations set forth herein.

3. This license shall not extend to or be deemed to include:

(a) Oratorios, choral, operatic or dramatico-musical works (including plays with music, revues and ballets) in their entirety, or songs or other excerpts from operas or musical plays accompanied either by words, pantomime, dance, or visual representation of the work from which the music is taken; but fragments or instrumental selections from such works may be instrumentally rendered without words, dialogue, costume, accompanying dramatic action or scenic accessory, and unaccompanied by any stage action or visual representation (by motion picture or otherwise) of the work of which such music forms a part.

(b) Any work (or part thereof) whereof the stage presentation and singing rights are reserved.

4. SOCIETY reserves the right at any time to withdraw from its repertory and from operation of this license any musical work as to which any suit has been brought or threatened on a claim that such composition infringes a composition not contained in SOCIETY'S repertory, or on a claim SOCIETY does not have the right to license the performing right in such composition.

5. LICENSEE agrees, upon demand in writing of SOCIETY, upon forms supplied by SOCIETY, whenever requested, to furnish a list of all music rendered at the premises hereby licensed, showing the title of each composition, and the publisher thereof.

6. In consideration of the license herein granted LICENSEE agrees to pay to SOCIETY for each contract year during the term of this Agreement the amount for such year set opposite the figure representing the expenditure for all entertainment at the premises during such contract year, as printed below in Schedule I (hereinafter called "the applicable annual rate"), unless mechanical music only is furnished at the premises. If mechanical music only is furnished at the premises and there is no "live" entertainment in any contract year, LICENSEE agrees to pay to SOCIETY the applicable amount printed below in Schedule II. If in any calendar year there should be both "live" entertainment and mechanical music, LICENSEE agrees to pay to SOCIETY in addition to the applicable annual rate in Schedule I, the applicable additional annual rate printed below in Schedule III. The rate paid for all mechanical music uses under Schedule II or III shall be the highest rate applicable to any such use.

The expenditure for all "live" entertainment at the premises for the current contract year of this Agreement is hereby estimated at $ in accordance with the provisions for estimating "Annual Expenditure for All Entertainment at the Premises" as printed below in Schedule I. For each of the succeeding years of this Agreement such annual expenditure for all entertainment at the premises shall be estimated on the basis of the expenditure for all entertainment at the premises for the previous contract year (or part thereof, if LICENSEE operated only part of such previous contract year, in which case such annual expenditure shall be prorated). Within twenty (20) days after the end of each contract year (or part thereof if LICENSEE operated only part of such contract year) during the term of this Agreement an adjustment shall be made on the basis of the expenditure for all entertainment at the premises for such contract year (or such part thereof on a prorated basis).

The total license fee for the first calendar year of this Agreement is estimated at $, based on a license fee under Schedule I of $ and a license fee under Schedule II or III of $.

The term "expenditure for all entertainment at the Premises" as used in this Agreement shall be deemed to include all payments made (whether in money or in any other form) by LICENSEE for all entertainment at the premises, excluding any service in connection with entertainment rendered by the regularly employed staff of LICENSEE, but including the compensation paid to any persons whose services are especially and exclusively engaged for the presentation of any such entertainment.

Where any arrangement either by contract or otherwise exists between LICENSEE and any entity or person presenting entertainment at the premises, which arrangement or contract shall provide that as the consideration or any part thereof, certain or any accommodations or services are to be made available for its or his use, then in such case, the extent of such accommodations or services shall be clearly defined and the reasonable value thereof regarded as an expenditure by LICENSEE for such entertainment and reported to SOCIETY as expended during each contract year in which such entertainment is presented, provided that if LICENSEE and SOCIETY shall fail to agree as to the reasonable value of such accommodations or services the same shall be fixed at a sum equal to one-half of the prevailing rate charged to the guests of the premises for such accommodations or services.

7. (a) LICENSEE shall, on or before the 20th day of January, and on or before the first day of April, July and October of each contract year during the term of this Agreement, pay to SOCIETY a sum equal to one-fourth (¼th) of the annual sum payable hereunder. The payment made on or before the 20th day of January of each contract year during the term of this Agreement shall be accompanied by a statement, on forms to be supplied by SOCIETY, showing (a) the expenditure

for all entertainment at the premises for the preceding contract year; (b) if there was mechanical music but no "live" entertainment, said statement shall show: number of guest rooms, whether there is dancing to the mechanical music, a cover, minimum or admission charge to any of the rooms in which mechanical music is furnished, and whether a show or act is presented; or (c) if there were both "live" entertainment and mechanical music, said statement shall show the information described in both (a) and (b) of this paragraph. If LICENSEE operated only part of a contract year, LICENSEE shall furnish such statement to SOCIETY within twenty (20) days after the end of such part of such contract year.

(b) In the event LICENSEE shall be delinquent in the payment of license fees due under Subparagraph "(a)" hereof by forty-five (45) days or more, LICENSEE shall pay a finance charge on the license fees due of 1½% per month, or the maximum rate permitted by law, whichever is lesser, from the date such license fees should have been paid pursuant to Subparagraph "(a)" hereof.

8. (a) SOCIETY shall have the right to require such reasonable data or information relating to the annual expenditure for all entertainment at the premises as provided by this Agreement, in addition to that furnished under Paragraph "7" of this Agreement, as may be deemed necessary in order to ascertain the annual expenditure for all entertainment at the premises, as provided by this Agreement. SOCIETY shall have the further right, by its duly authorized representatives, at any time during customary business hours, to examine the books and records of account of LICENSEE only to such extent as may be necessary to verify such statement or statements as may be rendered pursuant to this Agreement. SOCIETY shall consider all data and information coming to its attention as the result of any such examination of books and records as completely and entirely confidential.

(b) The period for which the SOCIETY may audit pursuant to this Agreement shall be limited to three calendar years preceding the year in which the audit is made; provided, however, that if an audit is postponed at the request of LICENSEE, SOCIETY shall have the right to audit for the period commencing with the third calendar year preceding the year in which notification of intention to audit was first given by SOCIETY to LICENSEE; and provided further, that in the event such audit reveals a deficiency, then such audit may cover the additional preceding three calendar years. This three or six year limitation (as the case may be) shall not apply if LICENSEE fails or refuses after written notice from SOCIETY to produce the books and records necessary to verify any report or statement of accounting required pursuant to this Agreement. Nothing herein shall restrict SOCIETY'S right to audit under previous license agreements, for all periods covered by said agreements, subject to a total of three or six years (as the case may be) for all audits under all said license agreements.

(c) In the event any such audit shows LICENSEE to have underpaid the license fees due SOCIETY by 5% or more, LICENSEE shall pay a finance charge on the license fees shown due of 1½% per month, or the maximum rate permitted by law, whichever is lesser, from the date(s) the license fees should have been paid pursuant to this Agreement.

(d) In the event any such audit shows LICENSEE to have underpaid the license fees due SOCIETY by less than 5%, LICENSEE shall pay a finance charge on the license fees shown due of 1½% per month, or the maximum rate permitted by law, whichever is lesser, from the date SOCIETY demands payment of such amount.

9. Upon any breach or default by LICENSEE of any term or condition herein contained, SOCIETY may terminate this license by giving LICENSEE thirty days notice to cure such breach or default, and in the event that such breach or default has not been cured within said thirty days, this license shall terminate on the expiration of such thirty day period without further notice from SOCIETY. In the event of such termination, SOCIETY shall refund to LICENSEE any unearned license fees paid in advance.

10. In the event that LICENSEE shall discontinue the use of music at the premises before the expiration of any contract year during the term of this Agreement, LICENSEE shall give immediate written notice thereof to SOCIETY and, within twenty (20) days after the date of such discontinuance, an adjustment shall be made on the following basis for the part of such contract year preceding such discontinuance:

(a) If the music so discontinued is "live" entertainment only, the adjustment shall be computed on the basis of the expenditure for all entertainment at the premises for such part of the contract year preceding such discontinuance as set forth in Schedule I.

(b) If the music so discontinued is mechanical music only, the adjustment shall be computed on the basis of the applicable annual rate set forth in Schedule II, reduced pro rata on the basis of the number of months in which music was performed.

(c) If the music so discontinued is both "live" and mechanical, the adjustment shall be computed on the basis of the expenditure for all entertainment at the premises for such part of the contract year preceding such discontinuance as set forth in Schedule I in addition to the applicable additional annual rate set forth in Schedule III, reduced pro rata on the basis of the number of months in which music was performed.

After such adjustment has been made, LICENSEE shall not be obligated to make further payments to SOCIETY hereunder until such time as LICENSEE shall resume the use of music at the premises during the term of this Agreement. In the event of such resumption by means of "live" entertainment only, LICENSEE shall estimate its expenditure for all entertainment at the premises for the contract year or part thereof in which the use of music is resumed on the basis of the expenditure for all entertainment at the premises during the first full month of operation after such resumption multiplied by 12 or such lesser number of months remaining in such contract year. Within twenty (20) days after the end of such contract year an adjustment shall be made on the basis of the expenditure for all entertainment at the premises for such contract year or part thereof as provided in Paragraph "6" of this Agreement. In the event of such resumption by means of mechanical music only, LICENSEE shall pay the annual amount provided in Schedule II, on the dates specified in Paragraph "7" of this Agreement, reduced pro rata on the basis of the number of months in which no music was performed. In the event of such resumption by means of both "live" entertainment and mechanical music, LICENSEE shall (a) estimate its expenditure for all entertainment at the premises for the contract year or part thereof in which the use of music is resumed on the basis of the expenditure for all entertainment at the premises during the first full month of operation after such resumption multiplied by 12 or such lesser number of months remaining in such contract year and within twenty (20) days after the end of such contract year an adjustment shall be made on the basis of the expenditure for all entertainment at the premises for such contract year or part thereof as provided in Paragraph "6" of this Agreement and (b) pay the additional annual rate provided in Schedule III on the dates specified in Paragraph "7" of this Agreement reduced pro rata on the basis of the number of months in which no music was performed.

11. This Agreement shall enure to the benefit of and shall be binding upon the parties hereto and their respective successors and assigns, but no assignment shall relieve the parties hereto of their respective obligations hereunder.

12. If LICENSEE shall cease to operate the premises, whether by reason of the sale or lease of the premises, or otherwise, then upon said date, this Agreement and the obligation of LICENSEE to make payments to SOCIETY hereunder shall terminate, provided, however, that LICENSEE shall give immediate written notice thereof to SOCIETY setting forth the manner of cessation, and the LICENSEE shall continue to be liable to SOCIETY for the pro rata amount of the then current contract year's payment for the period until said date.

IN WITNESS WHEREOF, this Agreement has been duly subscribed and sealed by SOCIETY and LICENSEE this _____ day of _____, 19____.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

By _____

_____
(Title)

LICENSEE _____

By _____

_____
(Title)

RATE SCHEDULE–HOTELS AND MOTELS

–If live music *only* is presented, use Schedule I

–If mechanical music *only* is presented, use Schedule II.

–If *both* live and mechanical music are presented, use Schedules I *and* III.

SCHEDULE I

For "live" entertainment, the sum to be paid by LICENSEE to SOCIETY for each calendar year during the term of this Agreement shall be the amount in the right-hand column below which corresponds to the "Annual Expenditure for all Entertainment at the Premises" during the then current calendar year as shown in the following Schedule:

Annual Expenditure for All Entertainment at the Premises	Annual Rate for Calendar Year				
	1989	1990	1991	1992	1993
Less than $ 2,000.00	$ 110	$ 113	$ 117	$ 120	$ 125
$ 2,000.00 to 4,999.99	154	159	163	168	175
5,000.00 to 9,999.99	231	238	245	252	263
10,000.00 to 14,999.99	303	312	321	331	344
15,000.00 to 24,999.99	457	471	485	499	519
25,000.00 to 34,999.99	605	623	642	661	688
35,000.00 to 49,999.99	754	777	800	824	857
50,000.00 to 64,999.99	902	929	957	986	1,025
65,000.00 to 79,999.99	1,139	1,173	1,208	1,245	1,294
80,000.00 to 99,999.99	1,518	1,564	1,610	1,659	1,725
100,000.00 to 119,999.99	1,898	1,955	2,014	2,074	2,157
120,000.00 to 139,999.99	2,277	2,345	2,416	2,488	2,588
140,000.00 to 159,999.99	2,657	2,737	2,819	2,903	3,020
160,000.00 to 179,999.99	3,036	3,127	3,221	3,318	3,450
180,000.00 to 199,999.99	3,416	3,518	3,624	3,733	3,882
200,000.00 to 249,999.99	3,795	3,909	4,026	4,147	4,313
250,000.00 to 299,999.99	4,180	4,305	4,435	4,568	4,750
300,000.00 to 349,999.99	4,554	4,691	4,831	4,976	5,175
350,000.00 to 399,999.99	5,060	5,212	5,368	5,529	5,750
400,000.00 to 449,999.99	5,313	5,472	5,637	5,806	6,038
450,000.00 to 499,999.99	5,693	5,864	6,040	6,221	6,470
500,000.00 to 599,999.99	6,050	6,232	6,418	6,611	6,875
600,000.00 to 749,999.99	6,600	6,798	7,002	7,212	7,500
750,000.00 to 999,999.99	7,700	7,931	8,169	8,414	8,751
1,000,000.00 to 1,499,999.99	8,800	9,064	9,336	9,616	10,001
1,500,000.00 to 1,999,999.99	9,900	10,197	10,503	10,818	11,251
2,000,000.00 to 2,999,999.99	11,000	11,330	11,670	12,020	12,501
3,000,000.00 to 3,999,999.99	12,100	12,463	12,837	13,222	13,751
4,000,000.00 to 4,999,999.99	14,300	14,729	15,171	15,626	16,251
5,000,000.00 to 5,999,999.99	15,950	16,429	16,921	17,429	18,126
6,000,000.00 to 6,999,999.99	19,800	20,394	21,006	21,636	22,501
7,000,000.00 and over	19,800	20,394	21,006	23,500	23,500

Method of Estimating "Annual Expenditure for All Entertainment at the Premises" (as defined in Paragraph "6") for the First Calendar Year (or Part Thereof) of this Agreement:

I. If LICENSEE has operated with a policy of music for the full calendar year prior to the commencement date of the Agreement, LICENSEE shall estimate its expenditure for all entertainment at the premises for the first calendar year (or part thereof) of this Agreement on the basis of the expenditure for all entertainment at the premises during such full calendar year prior to the commencement date of this Agreement.

II. If LICENSEE has operated with a policy of music less than a full calendar year prior to the commencement date of this Agreement, LICENSEE shall estimate its expenditure for all entertainment at the premises for the first calendar year (or part thereof) of this Agreement at a sum equal to the average monthly expenditure for all entertainment at the premises during the period of operation prior to the commencement date of this Agreement times the number of months of LICENSEE's operation during said first calendar year or part thereof.

III. If LICENSEE has not operated with a policy of music for any period prior to the commencement date of this Agreement, LICENSEE shall estimate its expenditure for all entertainment at the premises for the first calendar year (or part thereof) of this Agreement on the basis of the expenditure for all entertainment at the premises during the first full month of operation times the number of months of LICENSEE's operation during said first calendar year of part thereof.

SCHEDULE II

MECHANICAL MUSIC ONLY

A No Dancing; No Cover, Minimum or Admission Charge; and No Show or Acts*

No. of Rooms	Annual Rate for Calendar Years 1989	1990	1991	1992	1993
1-300	$168	$175	$182	$190	$199
Over 300	232	241	251	261	274

B One of: 1) Dancing; 2) Cover, Minimum or Admission Charge; or 3) Show or Acts*

No. of Rooms	Annual Rate for Calendar Years 1989	1990	1991	1992	1993
1-100	$225	$234	$243	$253	$266
101-300	309	321	334	347	364
301-500	468	487	506	526	552
Over 500	618	642	668	695	730

C Two of: 1) Dancing; 2) Cover, Minimum or Admission Charge; or 3) Show or Acts*

No. of Rooms	Annual Rate for Calendar Years 1989	1990	1991	1992	1993
1-100	$309	$321	$ 334	$ 347	$ 364
101-300	468	487	506	526	552
301-500	693	720	749	779	818
Over 500	926	963	1,002	1,042	1,094

D With Dancing, Cover, Minimum or Admission Charge, and Show or Acts*

No. of Rooms	Annual Rate for Calendar Years 1989	1990	1991	1992	1993
1-100	$ 514	$ 534	$ 556	$ 578	$ 607
101-300	794	825	858	893	938
301-500	1,066	1,109	1,153	1,199	1,259
Over 500	1,328	1,381	1,436	1,494	1,569

E. With Audio-Visual Works

If audio-visual performances of mechanical music (such as the use of a large-screen projection television or performances in guests' private rooms at the premises by means of pay or cable television, motion pictures, videotapes, or any similar means or method) are given, use the applicable category above and add 50%; such uses do not include performances by means of a single receiving apparatus of a kind commonly used in private homes, unless a direct charge is made to see the transmission or the transmission thus received is further transmitted to the public. Such uses include only performances for which a license is required by the United States Copyright Law.

*"Show or Acts" shall include use of a disc jockey or video jockey.

SCHEDULE III

MECHANICAL MUSIC AND LIVE MUSIC

A. No Dancing; No Cover, Minimum or Admission Charge; and No Show or Acts*

No. of Rooms	Annual Rate for Calendar Years 1989	1990	1991	1992	1993
1-300	$ 99	$103	$107	$111	$117
Over 300	140	146	152	158	166

B. One of: 1) Dancing; 2) Cover, Minimum or Admission Charge; or 3) Show or Acts*

No. of Rooms	Annual Rate for Calendar Years 1989	1990	1991	1992	1993
1-100	$133	$138	$144	$150	$158
101-300	187	195	202	211	221
301-500	243	253	263	274	288
Over 500	318	331	344	358	376

C. Two of: 1) Dancing; 2) Cover, Minimum or Admission Charge; or 3) Show or Acts*

No. of Rooms	Annual Rate for Calendar Years 1989	1990	1991	1992	1993
1-100	$187	$195	$202	$211	$221
101-300	243	253	263	274	288
301-500	346	360	375	390	409
Over 500	505	526	547	569	597

D. With Dancing, Cover, Minimum or Admission Charge, and Show or Acts*

No. of Rooms	Annual Rate for Calendar Years 1989	1990	1991	1992	1993
1-100	$ 514	$ 534	$ 556	$ 578	$ 607
101-300	794	825	858	893	938
301-500	1,066	1,109	1,153	1,199	1,259
Over 500	1,328	1,381	1,436	1,494	1,569

E. With Audio-Visual Works

If audio-visual performances of mechanical music (such as the use of a large-screen projection television or performances in guests' private rooms at the premises by means of pay or cable television, motion pictures, videotapes, or any similar means or method) are given, use the applicable category above and add 50%; such uses do not include performances by means of a single receiving apparatus of a kind commonly used in private homes, unless a direct charge is made to see the transmission or the transmission thus received is further transmitted to the public. Such uses include only performances for which a license is required by the United States Copyright Law.

*"Show or Acts" shall include use of a disc jockey or video jockey.

APPENDIX 3.—LETTER FROM MARVIN L. BERENSON, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, BROADCAST MUSIC, INC. (WITH ATTACHMENTS), TO HON. WILLIAM J. HUGHES, CHAIRMAN, SUBCOMMITTEE ON INTELLECTUAL PROPERTY AND JUDICIAL ADMINISTRATION, APRIL 1, 1994

BMI

Marvin L. Berenson
Senior Vice President
General Counsel

April 1, 1994

Honorable William J. Hughes, Chairman
Subcommittee on Intellectual Property
and Judicial Administration
207 Cannon House Office Building
Washington, D. C. 20515

Dear Chairman Hughes:

Public Accommodations Act of 1993 - HR 3288

In follow up to your hearings, I am enclosing BMI's responses and materials relating to questions raised and issues discussed relating to performing rights licensing.

I would be pleased to answer questions which you have and would be happy to meet with you and your staff.

Very truly yours,

Marvin L. Berenson

Enclosures

HughesHearings.41

320 West 57th Street, New York, NY 10019-3790 (212) 830-2533 Fax: (212) 397-0789 Telex 127823

**Comments of Broadcast Music, Inc.
Concerning the Oversight Hearings on
Music Licensing Practices of
Performing Rights Organizations Before
the Subcommittee on Intellectual Property and
Judicial Administration of the Committee
on the Judiciary of the House of Representatives**

INTRODUCTION

In February 1994, Chairman Hughes' conducted two days of oversight hearings concerning the music licensing practices of the performing rights organizations, BMI, ASCAP and SESAC. At those hearings, a number of music users representing various industries submitted written statements and testified. In this submission, BMI responds to the testimony of ASAE, the American Choral Directors Association, Messrs. Swinburn and Mayer on behalf of public assembly facilities, Guy Gregg, owner of The Publick House restaurant, the National Licensed Beverage Association, and various radio broadcasters.

AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES

Broadcast Music, Inc. (BMI) offers the following responses to the claims made by the American Society of Association Executives (ASAE) in its Testimony of February 24, 1994.[1]

ASAE and its Membership

ASAE points out the size of its membership - 22,000 members serving 10,000 voluntary associations, and emphasizes the educational nature of its activities. BMI certainly has no disagreement with ASAE's description. We would only note that ASAE's emphasis on its educational activities has no bearing on its members' obligations to comply with the provisions of the Copyright Law. While there is an exemption for certain types of educational activities in the Copyright Act, that exemption does not bear upon the activities discussed by ASAE.

ASAE's posture that its activities should require copyright holders to donate their creations because of ASAE'S educational activities is totally unwarranted. There is no more reason for musical works to be donated to ASAE and its members than for copy machines, telephone service or convention centers to be donated to ASAE and its members.

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[1]Headings and page references refer to the headings and page references of ASAE in its written testimony.

ASAE and Music Licensing

In its recitation of the history of licensing of the public performance of music by associations, ASAE states that it was assumed that the performing rights organizations chose to ignore the association community because of minimal and sporadic use of copyrighted music by associations, which exist primarily to provide education, and that music licensing was taken care of by hotels, convention centers, and conference centers.

BMI did not "ignore" the association community in its licensing efforts prior to the 1990 industry-wide agreement. However, a multitude of innovations and improvements in sound and stereo technology took place in the 1980's, which are of course continuing today. These innovations and improvements have facilitated the use of music as an effective marketing tool for businesses, and the meetings, conventions and associations industries have, we believe, been at the forefront of this expansion. While BMI had some licenses for associations and other presenters of similar events in place, and had introduced an agreement 21 specially designed for Trade Shows/Conventions in 1989, in 1990 BMI participated in negotiations with a Task Force composed of four major associations: Meeting Planners International (MPI), American Society of Association Executives (ASAE), Professional Convention Management Association (PCMA), and the Religious Conference Management

Association (RCMA). At that time, and with the endorsement of all of the associations, BMI gave a higher priority to the licensing of those areas.

ASCAP and BMI Practices

ASAE states that the practices of ASCAP and BMI have been the subject of hundreds of complaints to ASAE. Testimony, p.3. ASAE's statement is misleading.

When ASAE has made similar claims in the past, each and every time BMI has asked for the specifics of the claims so that the claims could be addressed. When ASAE did provide BMI with some specifics, we found that either the claims were incorrect or a response was merited. Attached hereto as Exhibit 1 is the letter to which ASAE refers at page 9 of its testimony and BMI's response thereto which provides more detail about our responses to complaints. As stated in our February 27, 1992 letter, we have not received complaints from ASAE since January 22, 1991.

As BMI stated in its testimony at the February 24, 1994 hearings, BMI has attended many meetings and conferences of the associations which negotiated for the license agreement currently in use including many ASAE meetings. There have been complaints at these meetings and we have done our best to respond to them. There have also been a number of complaints which have appeared in various trade publications of the associations, but those complaints, just like the claims made in ASAE's testimony, have been without

specificity and were, by and large, directed primarily at the size of the fees and the complexities of the agreement which the associations themselves negotiated with BMI. As set forth in our February 27, 1992 letter, BMI has always been ready to discuss problems and we believe that the appropriate time to make changes in the agreement is when the expiration of the agreement draws near. The current agreement expired December 31, 1993 (although it did renew for a one year term when neither side elected to cancel it). BMI received only a very few perfunctory inquiries as to renegotiation of the agreement. BMI was ready to discuss changing the agreement, and no one made any serious effort to meet with us.

Harassment and Intimidation Tactics

ASAE states that BMI offered "'amnesty' from prosecution" to those who would sign the negotiated license agreement when it was first offered, and then speaks of BMI's accusations, threats and demands, to support its claims that BMI treated music users as if they were criminals. These claims by ASAE distort the truth.

The concept of releasing or waiving those members of the associations who signed the license agreement from past infringements was a negotiated issue which arose during the negotiations. The concept is what ASAE itself and the others requested and desired, and the term "amnesty" was specifically raised by the Task Force and demanded by the Task Force during the negotiations. It is surprising that

now ASAE gives a criminal connotation to their very own term.

Despite the harmless use of the term "amnesty" which was used by the negotiators, it is interesting to note that the subject was dealt with in mailings by BMI to music users on only two occasions without the specific use of the term amnesty. The first was in a joint letter sent to the industry by the Music Licensing Task Force and BMI on the Task Force's letterhead.
(Exhibit 2). It stated:

> We are pleased that the Agreement between BMI and the Task Force provides that no fees are required by BMI until October 1, 1990.

The second letter that BMI sent is attached to Exhibit 1 and is identified as "Follow-up 1". It said:

> And, if you return the signed agreement to us by December 31, 1990, you'll be able to take advantage of the October 1, 1990 start date as negotiated with the Music Licensing Task Force ...
>
> This means that BMI is waiving license fees during the 9-month period January to September, 1990....

The accusations and demands of which ASAE now complains in this section of its testimony are dealt with in our February 27, 1992 letter which is attached hereto as Exhibit 1. We refer especially to the form letters which are attached to

our letter and which speak for themselves. We submit that ASAE's testimony on this matter is totally incorrect.

With regard to ASAE's claim that the societies make no attempt to explain the alternatives to signing agreements to users, we can only respond on behalf of BMI, and we refer to ASAE's Association Report of November, 1990, attached hereto as Exhibit 3, which clearly refers to alternatives. (pp. 1 and 7) We have seen many subsequent articles in the press and trade magazines of the associations explaining these alternatives and proposing others. ASAE and its members are very aware of and have always been aware of the alternatives to blanket licenses.

BMI actually participated in scores of national, regional and state association meetings. During these meetings, BMI participated in educational panels to educate the attendees of these conventions. Additionally, BMI created a video with the approval of the Task Force which BMI has widely distributed in order to educate BMI licensees and prospective licensees (copies are available upon request).

Blanket License Only

ASAE complains of the "inflexible, multi-year, automatically-renewable, minimum-fee, full-repertory 'blanket' licenses."

The very license of which ASAE so bitterly complained was fully negotiated with ASAE and the Music Licensing Task Force over many months and was described by

ASAE in its Association Report as "fair and beneficial to all parties". Exhibit 3, p.8.

ASAE also complains that BMI refuses to interpret or amend the agreements and complains that we do modify the agreements. This is rather difficult to respond to without specific facts, other than to say that BMI will interpret the agreements wherever required and, as contemplated by the BMI consent decree, may amend or modify an agreement where "business factors" justify. Article VIII(A).

With respect to ASAE's claim that the BMI consent decree requires program licenses and that BMI refuses to offer them, ASAE misreads the decree. Article VIII(B) requires BMI to offer "upon the request of any unlicensed broadcaster" per program or per program period licenses "by broadcasting". Obviously, the provision applies only to broadcasters and broadcasting. Article IX(C) does provide for the licensing of specific musical compositions upon request of others than broadcasters at fees fixed by BMI with the consent of its affiliates. BMI has always been available to assist in this procedure, and, as is apparent from ASAE's Association Report, ASAE knows that it can "approach the copyright owner of the music for a license" (p.1).

It should also be noted that the subject of a per program license did come up during the negotiations with the Music Licensing Task Force. ASAE and the other negotiators realized the difficulty of keeping track of music that is

performed during the various conventions and shows, and recognized that a per program license would be inappropriate and not cost effective. Furthermore, they have since complained that even reporting the events is too burdensome, which does not require identification of the music used at each event.

Arbitrary Selection of Licensees

In this section of its testimony, ASAE identifies the types of music users ASAE has decided that BMI should license instead of licensing the presenters of the events. ASAE believes booking agents, hotel or convention center personnel or event producers should be licensed rather than the associations which are presenting events. ASAE also imputes "serious anti-competitive" problems to the fact that both ASCAP and BMI have independently concluded that presenters of the events are the appropriate parties to license.

It is BMI's belief that the only efficient, cost-effective and reliable method of licensing trade shows, conventions, expositions and similar events is to license the presenters of those events - in this case, the associations.

Music at trade shows, conventions and similar venues is performed in a variety of ways, on the main floor, at awards ceremonies, at dinners and at exhibits, to name just a few, and either as live or recorded performances. Specific performances may be directly presented by the

presenter of the show or event, by the producer, the sponsor, the exhibitor and, of course, by the musician. Shows and conventions may have hundreds of exhibitors.

It would be an incredibly inefficient use of time and effort for BMI to attempt to license each exhibitor who may perform music at these venues. First, we would have to know who was attending each show. We would have to know who was performing music. We would have to go through the licensing process with each. And we would still have to license the presenter for uses of music not attributed to an exhibitor. Even were this possible to do, our fees would have to reflect the expense involved and the fees would doubtlessly multiply.

BMI will not address at depth here the various issues concerning vicarious liability of and contributory infringement by trade show organizers. In brief, these concepts hold that those with control, the ability to control and a financial benefit, or those who contribute to an infringement, are responsible jointly with the actual infringer. During the negotiations, the Task Force specifically desired to include in the BMI license agreement as many functions which take place at these events as possible. (See discussion below at p. 20.) The concepts are the subject of several law suits in which ASCAP is involved. Under the law as it now stands, we believe it is clear that the organizers of the show or convention are responsible for

the music performed and under the law the presenter would be responsible for the music anyhow, whether the exhibitor took a license or did not. This is another reason it is wasteful to license the exhibitor - especially in light of the obvious fact that the presenter can pass along the cost of licensing to its exhibitors as it does with all other costs of the event.

There has not been any "anti-competitive parallel" conduct by BMI and ASCAP. BMI and ASCAP independently arrived at the same conclusion with regard to which is the proper party to license because it is the only rational conclusion.

Secret Agreements

ASAE claims that BMI refuses to disclose the terms of industry-wide license agreement forms, leaving music users no way to check or control their fees.

The negotiations with ASAE and the other members of the Music Licensing Task Force took place over many months. If fees of other music users were not discussed (and we question whether that is accurate), it was (to borrow from a current stock brokerage commercial) only because the Task Force did not ask.

As stated in Mr. Berenson's testimony, BMI uses direct mail as an important part of its licensing effort. Direct mail involves the mailing of tens of thousands of packages which contains explanatory letters, brochures and

license agreements. The mailings are made to all kinds of music users; restaurants, shopping centers, hotels, universities, athletic clubs and many other categories. License agreements for each category are contained in almost every mailing, and no series of mailing is made to a category of user without at least one of the mailings containing a license agreement. Agreements are available for the asking and on many occasions without asking.

Finally, and most obvious, many BMI agreement forms have been reprinted in books and periodicals about the music industry. See, e.g., This Business of Music, Shemel and Krasilovsky (6th ed.).

With regard to the custom car show license to which ASAE refers, the custom car show association had last entered into licensing arrangements with BMI in 1968. This arrangement was long out-dated and the fees did not reflect the current marketplace. As we stated above, the use of music at conventions and trade shows has increased dramatically as a result of technological changes. The car show arrangements were terminated shortly after the industry-wide license was negotiated at the end of the current term of the custom car show association license, with appropriate notice.

Exceptions

ASAE claims that BMI refuses to recognize and accept exceptions to the obligations to pay music licensing

fees. ASAE sets forth as an example one of the societies' disagreement with the position of a non-profit nursery association that it was entitled to the Section 110(6) exemption for performances of musical works by non-profit agricultural or horticultural organizations in the course of an annual agricultural or horticultural fair.

The 1976 Copyright Act eliminated broad exemptions for types of organizations, such as non-profit organizations, and substituted instead specific exemptions for certain performances. Thus, a non-profit nursery organization may or may not be entitled to the Section 110(6) exemption, but the result will depend upon the event at which the music was performed, not upon whether or not the nursery association resembled a 4H group. If the nursery association did not supply specifics, certainly the performing rights society should be entitled to refuse to grant its permission to perform music. Was the event only a single annual event? Was the event a fair or an exhibition, or was it an association meeting dealing solely with business?

On-Line Access to Repertoires

ASAE and others also urge that free, on-line access to the repertoires of the performing rights organizations be provided. As discussed elsewhere in this response, the information sought regarding our repertoire is available upon request, by writing, calling or visiting BMI. As has also been explained, preparing and maintaining a hard-copy catalogue is expensive and, due to the rapidly changing nature of music use, any printed catalogue would be outdated before it would be completed.

Setting up, programming and maintaining an on-line service would also be very expensive.

The mandated creation of such an on-line service would single out the performing rights organizations from any other organization in providing access to its resources. The provision of on line access may raise issues of privacy, proprietary information and security problems. Notwithstanding these concerns, BMI has been and is currently actively examining the feasibility of providing on line access to its repertoire.

Coordination by ASCAP/BMI

In this section, ASAE summarizes its perceptions and misperceptions concerning BMI and ASCAP's practices and decides that, since the two organizations do have similarities, BMI and ASCAP do not act independently.

The organizations have different styles of doing business, but performing rights societies have a unique function representing both the needs of copyright holders who would otherwise be unable to effectively license the performance of their works and the music users who require legal access to music. Therefore, it is inevitable that some of our practices may be the same.

Notwithstanding some similar practices BMI and ASCAP do compete vigorously in the marketplace. Indeed BMI has spent its entire existence as ASCAP's principal competitor, distinguishing itself from ASCAP in every practical manner. BMI's presence in the marketplace has enhanced the competitive nature of music licensing and provided benefits to users and music creators that would not accrue if there were but one society.

No Oversight

ASAE claims that there is no effective recourse for dispute resolution, and then proceeds to list means for recourse and how those means have failed: contacting the societies; the Department of Justice; a rate court; arbitration; Congress.

With regard to contacting the societies, ASAE concedes that BMI did respond to its letter, although ASAE was not satisfied with our response. We have attached the letter (Exhibit 1) and believe that we did fairly respond.

With regard to the Department of Justice's supposed inactivity, we submit that it may not be that the activities of the performing rights societies are given a low priority, but that in truth the complaints are insubstantial and frequently do not withstand close scrutiny.

With regard to the supposed large fees in connection with pursuing a rate court resolution, ASAE states that it has 10,000 voluntary associations which it manages and/or represents. We understand from the trade press that some associations have formed "music defense funds" to defend against copyright infringement suits brought by ASCAP in connection with the licensing of presenters of events rather than exhibitors at the events. The $250,000 legal fee which ASAE mentions would cost each member $25.00. This hardly seems "exorbitant".

ASAE does not mention any problem in connection with arbitration as a means of recourse, other than the fact that it takes place in New York. Whatever one may think of New York, this hardly seems to be an overwhelming barrier to addressing the supposed extraordinary grievances that ASAE has.

Conclusion

ASAE, as it has done in the past, chooses to vent its dissatisfaction in a public forum, rather than deal directly with BMI. We have offered to resolve specific

complaints of ASAE, and the facts behind the complaints have not been forthcoming. We have offered to renegotiate the industry-wide license agreement, and no one comes forth. There is no need whatsoever for Congress to intervene in this matter.

BMI RESPONSE TO STATEMENT MADE BY
GENE BROOKS, D.M.E.
EXECUTIVE DIRECTOR
OF THE
AMERICAN CHORAL DIRECTORS ASSOCIATION

The American Choral Directors Association (ACDA) seeks special treatment under the U.S. Copyright Law in order to avoid the necessity of paying license fees to BMI and ASCAP. They ask first for a total exemption from any obligation to pay license fees for non-dramatic music performed at their conventions and meetings or, alternatively, an exemption which applied to all music conventions and meetings.

The reasons propounded in support of these proposals do not stand up to scrutiny.

ACDA argues that it is entitled to an exemption because it is a non-profit 501(c)(3) association devoted to "the advancement of choral music". Section 106 of the Copyright Law of the United States of America grants the copyright owner an exclusive right to perform the copyrighted work publicly. Sections 107 through 112 spell out various limitations on the rights granted to copyright owners. Section 110 provides that certain performances are not infringements of copyright. In particular, Section 110(1) states that performances "in the course of face-to-face teaching activities of a non-profit educational institution, in a classroom or similar place devoted to instruction" will be exempt.

The other subsections of Section 110 spell out other very specific uses that will be exempt such as performance "in the course of services at a place of worship". The attempt of the ACDA to expand these very narrow exemptions to cover any use that has some educational or religious overtones, is clearly contrary to the spirit of the copyright law which seeks to protect the creator's rights, and only to allow exemptions for specific instances where the general public good would benefit. Why are the "educational" goals of the ACDA any more worthy than the educational goals of every other music industry group? Should an association of symphonics be considered of less value than those of the choral directors?

Clearly, Congress should not legislate that one genre of music is of more value to the public than another and, therefore, should receive a specific exemption from the obligation to recognize the property interests of the copyright owner. And to legislate that all music association conventions and meetings should receive an exemption is equally discriminatory. Why should music organizations be relieved of paying for the use of copyrighted materials when other groups like medical associations and bar associations are required to obtain licenses?

ACDA argues that composers and publishers whose music is performed at their conventions receive fair compensation because the conventions promote the sale of that

music and introduce the works to an audience that may perform it in other settings. This kind of argument is disturbingly similar to the arguments put forth (unsuccessfully) by the radio broadcasters who said that because the performance of music on radio provided beneficial exposure of the music which, in turn, resulted in record sales, the broadcaster shouldn't have to pay license fees. Both Congress and the U.S. Federal courts disagreed. If music benefits the radio broadcaster, the fact that there may be a benefit to the copyright owner did not give the broadcaster the right to publicly perform the copyrighted materials without authorization. The same can be said for the ACDA.

The second argument made by the ACDA is that many choirs performing functions have already paid licensing fees for performances at their home institutions so that ASCAP and BMI are "double dipping". This allegation is simply factually inaccurate. If a choir performs at a college or at a university which has a BMI license, the performance by the choir is covered (even if they are a visiting group). And if a choir performs at a shopping center mall which has a BMI license, the shopping center license would include the performance of the choir. However, license fees for performances at the ACDA convention have not been paid by anyone, unless ACDA obtains a license agreement for its convention. ACDA does not expect the owner of the convention center to donate the premises, nor does ACDA expect the

telephone company to forgive its bill. They have no right to demand that Congress force copyright owners to donate their property without any compensation.

Finally, ACDA overlooks one very important point in their discussion of music licensing. That is the fact that they need not deal with BMI (or ASCAP) to get authorization to perform copyrighted music. BMI's affiliation agreements with its composers and publishers allows them to license any user of music directly. If, in fact, all of the composers and publishers whose music is performed at ACDA conventions and meetings feel, as Mr. Brooks suggests, that performances at ACDA functions are so beneficial that no other remuneration is required, they can grant a direct gratuitous license to the ACDA and there will be no need for the ACDA to obtain a license from BMI. And likewise, there would be no need to amend the copyright law to give choral organizations an exemption not provided to any other similar association.

RESPONSE TO SWINBURN & MAYER

This constitutes the response of Broadcast Music, Inc. ("BMI") to the testimony of Messrs. John S. Swinburn and Bob C. Mayer, who represent managers of public assembly facilities -- convention centers, arenas, auditoriums, stadiums, etc. -- which house events such as concerts, fairs, circuses and conventions.

At the risk of characterizing their testimony, both Messrs. Swinburn and Mayer argue for an exemption to be created in the Copyright Act from copyright infringement liability for owners of public assembly facilities who do not promote or co-promote the events at which copyrighted music is being played. The public assembly facility managers do not believe that it is fair that they be liable for copyright infringement for the playing of music over which they claim they have no control, and do not want to be placed into the role of enforcer of each event promoter's compliance with the Copyright law. BMI respectfully submits that such an exemption is completely unnecessary and would serve only to muddle the Copyright Act, because the law of vicarious liability, contrary to the concerns of these two witnesses, is adequate to address their concerns. For example, public assembly facilities probably are not vicariously liable when those facilities are truly acting as a mere landlord. See, e.g., Shapiro, Bernstein & Co. v. H.L. Green Company, 316 F.2d 304, 307 (2d Cir. 1963).

Both Messrs. Swinburn and Mayer concede that there are events which the facilities co-promote and/or which they receive a percentage of the profits. In such instances, because the facilities have both the right to control the event and a direct financial interest in the event, under the doctrine of vicarious liability they are liable when copyrighted music is played. Shapiro, Bernstein & Co., 316 F.2d at 307. The witnesses presumably agree that in such instances the facility should be liable for the playing of copyrighted music, but they want an exemption for all other instances.

BMI is not asking public assembly facilities to be enforcers -- that is the role they have chosen when they choose not to execute a BMI blanket license agreement specifically created for such facilities for all spectator events at which music is played. Under such an agreement the public assembly facility is licensed for an entire year to play all of BMI's copyrighted music at all spectator events. The facility manager does not have to worry about whether: (1) the promoter of each event held at the facility has secured a license; (2) the public assembly facility itself should secure a license for each event it co-promotes or for which it receives a percentage of the profits; or (3) the facility manager will be sued for copyright infringement. The cost of such a license is between $12.00 (for theaters with up to 250 seats) and $710.00 per event (for an arena

with 40,000 seats or more), depending upon seating capacity and admission price, or 1% of the entertainment costs, if the event is a festival.

It is not clear to BMI why public assembly facilities would rather ask Congress to create yet another exemption in the Copyright Act for those events which the facilities do not promote, then litigate whether a certain event falls within the statutory exemption, instead of merely taking an annual license which would cover all spectator events at the facility at which music is played. Presumably all or at least part of the modest costs of the license can be passed on to the promoters of the events, in the form of the facility rental fee, if the facility manager so desires.

Neither Messrs. Swinburn nor Mayer satisfactorily explains why public assembly facilities, which are in the business of providing a forum for numerous large scale events for the general public and for industry and trade groups and thus are well aware of the content of these events, should be exempt from responsibility for obtaining permission to publicly perform copyrighted music. To exempt them because they have not "promoted" the event -- even if they receive a percentage of ticket sales -- is wrong because they reap a financial benefit and are in essence co-promoting the event. The lack of actual involvement with the extent and type of music that is played is not and never has been the standard for the imposition of vicarious liability. See Southern

Nights Music Co. v. Moses, 669 F. Supp. 305 (C.D. Cal. 1987). Vicarious liability has been an integral part of the common law of copyright for many decades and was expressly endorsed in the House Report to the current Copyright Act:

> A well-established principle of copyright law is that a person who violates any of the exclusive rights of the copyright owner is an infringer, including persons who can be considered related or vicarious infringers... The committee has decided that no justification exists for changing existing law, and causing a significant erosion of the public performance right.

H. Rep. No. 94-1476 at 159-60. Simply put, there is no reason to tamper with a well-established common law doctrine which is fair and replace it with a statutory exemption subject to interpretation and the possibility of an equivalent amount of litigation.

The Congress has determined that copyright owners are entitled to royalties for public performances of their music. While it would be a perfect world if each promoter of an event containing public performances of music recognized his or her responsibilities and secured a license, and BMI works hard to educate all music users of their responsibility under the Copyright laws, it is simply impossible for BMI to police the entire universe of such events. However, it is not impossible for each public assembly facility to secure a license which would allow the public performance of BMI music at any spectator event. If there are still events for which the facility believes it is not responsible for the music

played, because the facility believes it is a mere landlord, it can choose not to license for those events which is no more or no less than what it would do if there was a special exemption written into the statute.

It is BMI's policy that in the event a facility does not promote or co-promote an event, such as a concert, BMI has not sought to license said facility. Instead, BMI has licensed the actual promoter of the event.

RESPONSE TO TESTIMONY OF GUY GREGG

The testimony of Guy Gregg, the owner of The Publick House in Chester, New Jersey, contains many misleading and inaccurate statements. In an effort to give this Committee as accurate a picture as possible of BMI's licensing practices and at the same time show some of the day to day challenges faced by BMI, it is necessary to answer Mr. Gregg's specific allegations. The Committee will see how Mr. Gregg's conduct brought the entire incident upon himself.

First of all, contrary to Mr. Gregg's recollection, he did, in fact, sign a license agreement with BMI as long ago as 1984. Copies of his original agreement and his current agreement are attached as Exhibit 4. BMI does not accept license fees in the abstract, that is, without the signing of an agreement between the parties, so that the rights and responsibilities of both the music user and BMI are clearly understood.

Paragraph 5 of Mr. Gregg's license agreement requires him to provide BMI with an annual report of the music policy at his establishment. That report serves as the basis for BMI to determine the appropriate license fee. If he were to renovate his establishment and either increase or decrease the room occupancy, that would affect the recorded music fee, which is based on maximum occupancy. If he were to increase or decrease his expenditures for live entertainment, that would cause an adjustment in his fee for that type

of music use. By requiring a simple report form to be completed and sent to BMI once a year, the music user is assured that he is being accurately charged in relation to all other similarly-situated users throughout the country.

Despite this contractual requirement, Mr. Gregg did not submit a report form for six contract years between 1987-88 and 1992-93. The copies of the bills from BMI which he attached to his Exhibit clearly indicated to him the unreported years. Mr. Gregg's zero balance was the result of his billings being based upon the then-current license fees for someone with no change in music use since the last time he reported in 1986.

Because BMI licenses tens of thousands of restaurants, night clubs and the like, a contract review process to identify and to solicit licensees who pay but who fail to report can only be undertaken every few years. Such was the case with Mr. Gregg--he was paying for his music use, but not necessarily the right amount, thereby giving him an unfair advantage with respect to the thousands of other establishment operators in the United States who complied with their contractual obligations to report annually for the purpose of assessing their fees.

Accordingly, BMI sent Mr. Gregg a number of letters advising him to report for his missing years so that his license fees would be accurately determined. A retroactive adjustment would then be made. Alternatively, BMI could have

considered Mr. Gregg's non-reporting to have been a breach of contract which would entitle BMI to cancel his agreement. However, BMI feels that it is better not to cancel licenses if another less drastic alternative can be found.

The facts show that Mr. Gregg received six years of monthly statements. Each statement indicated that he was delinquent in the filing of reports. Only after the oversight hearings were conducted by this Committee did Mr. Gregg submit the information needed so that the accurate fee was able to be determined and Mr. Gregg then submitted the proper payment to BMI.

Unfortunately, Mr. Gregg's approach is not atypical of some BMI licensees--they ignore both their contractually-required paperwork obligations as well as reminder letters, and then claim surprise and indignation when BMI adjusts their fees.

Addressing Mr. Gregg's and the other witnesses' general comments regarding music licensing and H.R. 3288, what should be focused upon is their basic misunderstanding about the nature of music used in a restaurant. Mr. Gregg states that "nobody picks a restaurant on the quality of its background music." While that may or may not be true, it does not follow that when a restaurant owner decides to use music, he should be entitled to use it for free. As Mr. Gregg himself concedes, patrons choose a restaurant for a nice "atmosphere". Unquestionably, one element of the

creation of the atmosphere is the use of music--why else incorporate it into the dining experience? Indeed, music can help define the atmosphere and clientele of a restaurant (e.g., The Hard Rock Cafe). Other items that are used to create atmosphere are the decision to put fresh flowers at dining table, the installation of dimmed lights, the serving of bread to all patrons regardless of what they order and the presentation of after-dinner mints with one's bill at the end of a meal. However, probably because all of those things are tangible items which have to be paid for or they wouldn't be received by the owner of the restaurant to use, neither Mr. Gregg nor any other witness would be presumptuous enough to ask Congress to pass a law which would allow them to be supplied, free of charge, flowers, lighting fixtures, or after-dinner mints because they are "incidental" to the business. But because music, no less an atmospheric component than those other items, is an intangible commodity, and is available to the user from tapes or broadcasts he obtains other than from the owner of the musical compositions, it suddenly becomes in many users' minds something worthy of special, uncompensable treatment. For Congress to acknowledge that would be devastating to the men and women who create that music and deserve to be paid for its use even when it is part of an atmospheric package in a restaurant. Copyright owners deserve as much to be paid for their contribution to the ambience in The Publick House as do

florists and the Andes Mint Company or the supplier of parsley.

For Mr. Gregg to say that copyright owners should restrict their licensing to the musicians themselves is to gloss over the fact that he is the one who decided to hire those musicians, presumably to get the benefit of their presence--customers--even if they are part of the package he is offering without charging a specific fee for patrons to hear them. He pays them for their talent as musicians. BMI's fees compensate the songwriters and publishers. In order to do the task that we are entrusted to do most efficiently and economically, a performing rights organization such as BMI must assess the beneficiary of the music--in this case the establishment proprietor. If BMI were required to license bands which are often formed spontaneously and are transient, fees would have to increase to track all of these performers. For decades judicial precedent has recognized that because the owner of an establishment is seeking out people to play music, he or she must, as a matter of fairness and equity to the owners of that music, be held responsible for it when those performances are not authorized.

Mr. Gregg's complaint that he has no access to a list of songs is likewise inaccurate. If he chooses to use music as an atmospheric inducement to customers, he must undertake the responsibility to plan his music programming.

BMI responds to written requests as to whether musical compositions are in its repertoire. But with the hundreds of songs being written daily and others being removed from BMI's licensing jurisdiction, there is no practical or inexpensive way that BMI can send Mr. Gregg or any other user a complete, reliable, up-to-date list of repertoire on a regular basis. Invitations to visit our headquarters to review our entire current repertoire are extended, and a book entitled BMI SONGS is provided upon such a request, so that many of BMI's more notable copyrights can be at hand to a user.

No one is forcing Mr. Gregg to have both a BMI license and one from another organization. If he wants to take the time to create an all-BMI, all-ASCAP or all-SESAC program of background music from CDs or tapes, he could do so with some effort. He can also directly license all his works through their publisher. The beauty of the blanket license is it saves Mr. Gregg the need to perform these efforts. If he chooses instead to make it easy upon himself and use the radio, where BMI, ASCAP and SESAC songs all appear, he is required to pay a modest premium for that convenience. The owner of the music should not be penalized because of a user's desire for simplicity. To the contrary, when one wishes added convenience in commercial transactions, he usually pays an added fee to receive that benefit. It is likely that a restaurateur would pay more if he chose to buy his food or beverages one item at a time than he does when he

purchases them by the caseload. The marketplace of music should be allowed to operate no differently.

Finally, Mr. Gregg makes much of the performing rights organizations "catching" unlicensed users. But since Congress has decided to leave enforcement of the copyright rights up the copyright owners themselves, how else does one maintain the integrity and value of the copyrights? A right without a remedy is meaningless--the unauthorized use of copyrighted music would be rampant. Because music is an intangible, so easily acquired by anyone from a variety of sources, the penalties for using it without permission need to be strict. Otherwise, why bother having a copyright at all? Nevertheless, BMI does not consider its primary role to be that of an enforcer. Only when many phone calls and letters and visits are made to an unlicensed user does an investigator get sent in to ascertain whether an unlicensed music user is performing BMI music. It is purely a last resort, albeit a very necessary one.

RESPONSE TO JOE JOHNSON AND MIKE LEONARD OF
THE NATIONAL LICENSED BEVERAGE ASSOCIATION

Mr. Leonard and Mr. Johnson make unwarranted attacks on certain licensing practices of the performing rights organizations. Some have already been discussed in connection with Mr. Gregg's testimony, namely information as to song titles. Others are not within the province of concern of the user, such as "lack of accountability" for fees collected. BMI attempts to efficiently account to its affiliates for the performance of their music. However, that accounting is a matter between the performing rights organizations and their writers and publishers.

Despite these witnesses' claims, license fees are hardly arbitrary, but rather are designed to reasonably compensate the copyright owner. Licensing criteria are designed to be understandable, however, and if a licensee or a prospective licensee has questions BMI's Licensee Relations Dept. is always ready to help.

The issue of so-called "double dipping" is one that must be answered. Music performed on radio and television is designed for the private home listener or viewer. When a radio or television is turned on in a public place it takes on a distinct characteristic, that of a business use. What is used in a business must be paid for. Rather than "double dipping", the writer or publisher is getting paid for a <u>separate and distinct</u> usage, in the same way that a playwright is paid once for a performance of his play on

stage, and is also entitled to be paid again if the play is performed on television. Separate payment for separate use is a justified concept.

Moreover, contrary to Mr. Leonard's claims, BMI has on at least two occasions invited the NLBA to join with it in establishing an industry-wide agreement. Copies of BMI's letters to that effect of December 9, 1993 and December 17, 1993 are attached as Exhibit 5. Because such group licensing results in economies for both the copyright owner and the music user, such an overture would never be dismissed lightly.

H.R. 3288, would take the long-recognized limited exemption to liability accepted by the copyright owner and expand it into a new, unfettered, widespread uncompensated use of music in thousands of food-and-drink establishments throughout the country. Music which they affirmatively have chosen to add to their menus because it does them good, adding to the kind of atmosphere they as business people believe will keep customers happy and coming back again and again. And since that, after all, is really what using music in public is all about--a contribution to the bottom line---the people who provide that contribution deserve to be compensated for their efforts. The U.S. Constitution from which the Copyright Law derives demands no less.

BMI strongly believes, in sum, that music users and the performing rights organization should negotiate a proper standard under Section 110(5) for small commercial establishments. Legislation is not the answer.

RADIO STATIONS

BMI has granted approximately 10,000 commercial radio stations in the United States and its territories full access to and the right to broadcast all of the approximately 2,500,000 musical compositions which comprise its repertoire. This grant of rights is in the form of either a blanket or per program license. Generally speaking, the blanket license is designed for most radio stations; the per program license is designed for those stations whose use of copyrighted music is minimal. Both forms of license currently offered by BMI are the product of extensive negotiations with the Radio Music License Committee, which represents thousands of radio stations across the United States and its territories. All of the terms and conditions of the two forms of license agreements presently in use, including the fee structure, were negotiated by BMI and the radio industry's designated representatives. BMI also has other license agreements in place for non-commercial radio station licensees.

In offering licenses to radio stations, BMI is guided by its consent decree, which requires it to treat similarly-situated prospective licensees in a similar manner. Since the entry of the consent decree, the radio industry has never deemed it necessary to seek either judicial or legislative intervention; it has relied on arm's-length negotiations. Historically, the blanket and per program license agreements have been mutually agreed to by both BMI

and the commercial radio industry. The agreements continue to thrive mainly because they are the products of the parties' arm's-length negotiations, the most recent of which concluded during November of 1993 after a 2-year long negotiation process which resulted in the license agreements presently being offered. In light of this history, and the fact that the blanket and per program license agreement, including the fee structures, work for the vast majority of radio stations licensed by BMI, BMI believes that any legislative intervention which would effectively renegotiate the terms and conditions of the licenses and, in particular, the fee structures, would not be appropriate or warranted.

The representatives of the religious, classical and Spanish language stations who have testified before Congress admittedly broadcast musical compositions from BMI's repertoire and thus "use," so to speak, BMI's product on both a feature use and incidental use basis. Collectively, these stations represent approximately only five percent of all stations licensed by BMI. Among other things, these commercial radio broadcasters argued that the per program license, which approximately 650 other commercial radio broadcasters have chosen, is not a viable alternative to the blanket license, contending that its fee structure unfairly discriminates against them and that its reporting requirements impose an unfair administrative burden.

As will be discussed below, the per program license is a viable, cost-effective and efficient alternative not only to the blanket license offered by BMI but also to these broadcasters' option of licensing the music which comprises BMI's repertoire directly from the owners of the songs' copyrights themselves. In essence these broadcasters contend as follows: (1) the blanket fee is too high because they use only a small amount of BMI music; and (2) the per program agreement is too burdensome because they use a great deal of music (most of which is not BMI music), and this would require extensive reporting which they would rather not do. The per program license always has been and continues (even through the recently-concluded industry negotiations) to be considered an agreement which works satisfactorily for the vast majority of commercial stations who have chosen it. BMI is aware of the concerns of this relatively small group of commercial broadcasters and we have been negotiating with them. However, we are constrained in our ability to offer special terms by the consent decree requirement that all similarly-situated licensees be accorded similar treatment in licensing. BMI does not believe that legislative intervention, particularly with respect to the per program license fee structure, would be appropriate. The system of establishing the per program license fee structure through private, arm's-length negotiations, has and continues to work to the satisfaction of the vast majority of broadcasters

whose interests are represented by the Radio Music License Committee as well as the ongoing negotiations between BMI and the National Religious Broadcasters Music License Committee (which represents religious, Hispanic and classical radio broadcasters).

The claim that the per program rate is "set at about four times the rate of the Blanket License" is false. In actuality, the ratio is approximately 2.6 to 1. The current blanket rate is 1.535% of net revenues, while the feature rate for per program licenses is 4%.

When Catherine Meloy testified that her station paid one third of the blanket rate while using BMI music only 2% of the time, she conveyed a false and misleading impression. The per program license has an incidental music use fee if which, when added to the feature music fee, if Miss Meloy is correct in her assertion, increased her station's overall fee to one third. The current per program license fee is comprised of two parts, a base fee (incidental music) and a supplemental fee (for feature music use). The base fee represents either four times the station's highest one minute rate (what it charges for advertising) per month, or .24% of the station's revenue. If Ms. Meloy's station plays BMI feature music only 2% of the time, the station will pay for that feature music use only for that 2% music usage (plus the base rate). The composition if played during morning drive time would be charged at 4% of the revenues

attributable to the time segment. If that same composition were to be played on the weekend, the station would pay at the rate of 25% of the 4% rate, or effectively 1% (lower than the blanket rate of 1.535%). The feature music fee is weighted by time of day, so that uses of BMI music in non-drive time are given lower weight in the fee calculation.

Although the classical broadcasters did not cite a single example of BMI having refused to respond to a request to indicate whether a specific musical composition is licensed by BMI, they nevertheless claim that BMI "refuse[d] to provide meaningful identification of its repertory." BMI responds on a regular basis to requests for information from licensees. The fact is that BMI is contractually-obligated to do so:

> BMI will, upon specific reasonable request made by licensee, indicate whether a number of specific musical compositions listed by licensee are licensed by BMI. Licensee shall provide: (1) title; (2) writer/composer; (3) publisher; and (4) recording artist of each musical composition requested to be identified. In the event licensee does not provide BMI with all of the information requested herein, BMI will attempt to identify whether suchmusical compositions are licensed by licensed by BMI, but will be under no obligation to make such identifications.[2]

In addition to promising to attempt to provide the aforesaid

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[2]The classical broadcasters did not cite a single instance in which BMI is alleged to have failed to fulfill the foregoing contractual obligation. Rather, here, as elsewhere, the broadcasters have engaged in "guilt by association." The circumstances which they recount as illustrative of their claim that BMI refuses to give "meaningful access to its repertory" relate not to BMI, but rather, to ASCAP alone.

information, BMI also grants to licensees the right to inspect, at its New York office, information which would enable them to ascertain whether a specific musical composition is licensed by BMI.

The broadcasters argue that the per program license reporting requirements are burdensome. The new BMI per program license agreement requires the licensee to furnish, among other things, with respect to all programming periods during the month, regardless of origin, which have any musical content, the following: (a) the title of each work; (b) the date and time of performance; (c) the name(s) of the writer(s)/composer(s); and (d) the name(s) of the publisher(s) and/or recording artist(s). In response to concerns raised by classical music stations, BMI has relaxed some of the reporting requirements for those stations. In addition, internally, BMI has created, at great expense and management time, a department whose function it is to assist stations to report properly. BMI's continuing policy, above and beyond contractual obligations is to assist per program licensees to fulfill their reporting requirement.

With respect to the claim that the per program license imposes "draconian" penalties in the event of a reporting mistake, an analysis of the new contract terms reveals that the sanctions are no more onerous than necessary to ensure adequate reporting. A significant number of stations either do not submit reports or submit insufficient

and/or inaccurate information, thereby hindering BMI's ability to properly ascertain fees. The remedies specified in the per program agreement in response to these circumstances were not unilaterally imposed. Rather, they were negotiated by BMI and the radio industry's designated representatives.

In their testimony, the classical broadcasters acknowledge that BMI's remedies for non reporting are "less harsh" than those of ASCAP, inasmuch as they involve lower charges themselves by error-free reporting for eighteen consecutive months. It must be acknowledged that some form of remedy for failure to report is required in order for BMI to administer the per program license.

AHORA is a group representing Hispanic-owned radio stations. BMI has a substantial Spanish language music repertoire. Moreover, those stations do not play only songs whose copyrights are owned by Hispanic songwriters and music publishers. Some of the songs broadcast are Spanish translations of non-Spanish compositions and some also play Anglo music. If a station is playing music 24 hours day and a lot of it is BMI music, whether it is Hispanic, Black, Country, etc., we have a right to be compensated.

AHORA argues that BMI's blanket license is unjust "because Spanish-language broadcasters use only a fraction" of BMI's repertory. BMI's blanket license gives unrestricted access to its total repertoire. The fact that some stations

represented by AHORA choose to limit their use of BMI music does not reflect a problem with the blanket license agreement itself, but rather, reflects a consequence of a conscious programming decision by the broadcaster who, if dissatisfied with that license format, may choose the per program license instead. A Spanish-language broadcaster whose station is licensed on a blanket license and uses a fraction of the repertoire available to it is in no different a position than a top forty station with a restricted play list. The per program license agreement might be more appropriate for that Spanish broadcaster. Additionally, an alternative option for these stations would be to license the music directly. When offered the per program format, however, these broadcasters protest that its reporting requirements are too "burdensome". BMI's response to that is that the broadcasters cannot have it both ways; that is, find fault regardless of the format.[3]

Mr. Gomez contends that the license fees collected by BMI from Hispanic stations should be paid only to Hispanic songwriters. It must be remembered that many Spanish stations perform music which is not written by Hispanic songwriters. Much of the music performed is Anglo-American music with Spanish or English lyrics. Additionally, Mr.

3It is interesting to note that the entities to which KIRT-AM, KABQ-AM and KQXX-FM are licensed and in which the AHORA spokesman, Mr. Gomez, is a principal, have not submitted annual revenue reports to BMI since 1990. In fact, the BMI licenses of all of those stations have been canceled for failure to submit contractually-required reports and to pay contractually-required license fees.

Gomez fails to reveal that a large segment of Hispanic format stations do not submit "logs" to BMI. These logs are used by BMI to pay the appropriate songwriters for the performance of their music. If there would be greater compliance by these stations, AHORA's complaint would be solved.

CONCLUSION

BMI respectfully submits that no legislation is required to resolve the issues raised by the participants in the February hearings. These issues are best resolved by private negotiations between the parties.

EXHIBIT 1

asae

AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES
The ASAE Building
1575 Eye Street, NW
Washington, DC 20005-1168
202-626-ASAE
FAX 202-371-8825

REC FEB -5 PM 3:55

LICENSING DEPT.

January 28, 1992

Ms. Frances Preston
President
Broadcast Music, Inc.
320 West 57th Street
New York, NY 10019

Dear Ms. Preston:

One year has passed since BMI began soliciting associations to license copyrighted music used at association-sponsored events through a blanket license agreement form negotiated in 1990 with the Music Licensing Task Force, of which the American Society of Association Executives was a member.

It is timely and appropriate for ASAE to provide its assessment of the first year of activities by your performing rights organization in the association community using the blanket license form. ASAE is the major national organization representing the association field, with a membership of over 20,000 professionals who are executives in over 9,000 associations, all of which typically sponsor events such as conventions, seminars, meetings, or trade shows, at which music could possibly be used. During the past year ASAE representatives have heard from literally thousands of its members regarding music licensing issues through phone calls, letters, and at meetings; the Society is now in a position to provide comments that accurately reflect the consensus of the association community.

To put it simply, BMI's activities in connection with its blanket license agreement in the association community have been extremely disappointing.

This letter outlines the concerns of the association community with BMI's activities; it concludes with a request that your organization take immediate steps to correct those activities.

The outline addresses three areas: implementation practices, program structure, and the blanket license agreement.

A. Implementation Practices

1. Harassment and Intimidation. BMI's first-year campaign to enlist associations as signatories of its blanket license agreement form has been one of relentless harassment and intimidation. This is contrary to the explicit understanding reached at the conclusion of BMI's negotiations with the Music Licensing Task Force, in which BMI agreed that it would engage in "education" rather than in the threats, coercion, deception, and bullying that have instead routinely been occurring. Following initial announcements, letters, and releases that were primarily educational in nature and that were concurred in, and in some cases initiated by, this Society, BMI quickly lapsed into a program to force associations to sign the blanket license agreement. Mass mailings by BMI state that associations must be using copyrighted music in BMI's repertory and thus have no alternative but to sign the license or face draconian legal penalties, which, in fact, are rarely ultimately imposed. Telephone inquiries to all levels of BMI personnel have often received rude and curt responses, generally conveying the message, "You must sign, or else . . .". Inadequate attention is paid in all BMI communications to the exceptions, alternatives, and grey areas (for example, the "home-style receiving apparatus" exemption; uses by agricultural, fraternal, or religious organizations; etc.). BMI's telemarketing personnel, who apparently work on a commission basis, are frequently ill-informed about licensing, unwilling to discuss alternatives to the BMI form, and generally intimidating in their attitude (One example: "We know you are using our music; if your don't sign the license, we are coming after you!"). All harassment and intimidation by BMI must end at once.

2. Refusal to Clarify or Amend the Form. BMI apparently has an inflexible policy against providing any written clarifications or making any amendments to the form of its blanket license agreement for associations. Your organization cites antitrust consent decree language prohibiting discrimination in rates or terms among similar users. That, however, would certainly not prevent BMI from issuing written definitions of unclear words or phrases, from amending non-essential terms such as by including a limitation on recourse through indemnification, or from providing other written clarifications or amendments to the form in specific appropriate instances when requested by associations. Clarifications and amendments should be permitted.

3. Unwillingness to License Others. Association-sponsored events are virtually always planned and conducted with a primarily educational purpose and atmosphere. For all but a few portions of most association events, music is a quite incidental and often quite unimportant aspect (in

contrast to the situation of electronic entertainment media, bars and restaurants, and other users). It is therefore often most appropriate and convenient that some party other than the association, which party may already have responsibility for other aspects of music played or performed at association events, have responsibility as well for copyright licensing when necessary. Hotels and convention centers, event production firms, talent agencies, trade show exhibitors, caterers, audio-visual companies, performers, and others who assist the association community are generally willing and able to fulfill this function; many of them already deal with BMI in other capacities. BMI's inflexibility in refusing to license these parties for their music performed or played at association-sponsored events is a very serious problem that must be corrected.

II. Program Structure

1. Mis-Use of Dominant Market Power. BMI and ASCAP declare themselves to be the largest assignees of performance rights for copyrighted music in the United States. Together they enjoy a virtual strangle-hold on the availability of those rights, with their joint market share apparently approaching one hundred percent. Legal, economic, and moral principles require that neither organization individually, nor both together, mis-use their dominant market power. Arbitrary selection of what entities or types of entities will be licensed, failure to disclose the music repertories that are licensed, exacting unreasonably high license fees and imposition of burdensome administrative obligations, unwillingness to issue single-program licenses for music used at association-sponsored events, and other such practices, which are maintained concurrently by both BMI and ASCAP, are improper in these circumstances. They must be discontinued.

2. Arbitrary Targeting of the Association Community. It was long assumed that copyrighted music played or performed at events sponsored by associations was either not subject to license at all or was covered by license agreements with BMI obtained by suppliers or others who assist the association community. BMI took no steps to change this assumption for many years. In the mid-1980s, BMI (and coincidentally ASCAP as well) decided to increase its "market" by targeting the association community for music licensing in connection with the primarily educational events sponsored by associations. Instead of arranging this through hotels and convention centers, event production firms, talent agencies, trade show exhibitors, caterers, audio-visual companies, performers, and others who assist the association community, many of which are already experienced in dealing with hospitality and entertainment matters in general and with BMI in particular and all of which are equally responsible under the law for copyright royalties, an appeal

was made directly to associations. This strategy decision by BMI was counter-productive and should be reversed.

3. Duplicative Charges for Music at Hotels. BMI has long negotiated and promulgated successive music licensing blanket agreement forms for use by the hotel industry. Most major hotels are signatories. The unequivocal terms of the current version of BMI's hotel industry blanket license agreement provide that all music performed or played on the hotel premises is licensed by BMI through that agreement except for music used at "industrial trade shows, expositions and business presentations." ASCAP's hotel industry form is equivalent in this respect. Associations that sponsor events using BMI music at hotels who have signed the hotel industry agreement, unless the events are "industrial trade shows, expositions or business presentations," are clearly not required by law to license that music usage from BMI. To do so results in duplicative payments to BMI and unjust enrichment of BMI. And yet BMI's blanket license form for associations purports to require a licensing agreement and royalty payments for that usage. BMI's question and answer document even addresses this issue in detail and declares, quite inaccurately, that the hotel industry blanket license agreements do not relieve associations of their music licensing obligations in any respect. There can be no other conclusion but that BMI has deliberately mis-led the association community in order to receive unnecessary royalty payments. The BMI blanket license agreement form, and any BMI materials describing or discussing it, must be changed at once to make clear that the association signatory is not responsible for a licensing agreement or royalty payments for use of BMI music where that use is already covered by another BMI blanket license agreement, including but not limited to music used at association-sponsored events held in BMI-licensed hotels other than "industrial trade shows, expositions or business presentations" .

4. Failure to Disclose Repertory. BMI does not publish or otherwise provide access to the repertory of copyrighted music for which it claims to hold assigned performance rights. Membership lists are available in some circumstances. And, in part by virtue of consent decree language, specific songs can be checked to determine if they are part of the BMI repertory in some circumstances. There are two unfair and self-serving results of this policy. First, it permits BMI representatives to make expansive, and quite possibly inaccurate, claims about the music for which the organization holds performance rights, with no ability for association users in any systematic or effective way to verify the size and quality of the repertory. In short, BMI insists that users buy "a pig in a poke". Second, and of even greater concern, it prevents association users of music to plan in any effective way to avoid use of BMI music and thereby preclude the need for a license from BMI. There is

no valid reason why your organization cannot publish its repertory, whether through a hard-copy periodical or a computer data base system (which are now as ubiquitous as pay telephones). Arrangements should be made to do that immediately.

III. The Blanket License Agreement

1. Rates and Rate Structure. Experience and inquiry by ASAE since promulgation by BMI of its blanket license agreement form suggest that the rates are exorbitantly high and that the rate structure is extremely unworkable. Cable television programmers pay a few cents for each viewer's year-long access to your music repertory. By comparison, the BMI rates for association-sponsored events are many times higher. Moreover, the rate structure established in your form is excessively complex and administratively cumbersome. Associations, like other blanket license users of your repertory, should be able to pay a modest, fixed annual fee without the inconvenience of frequent counting, calculating, reporting, and remitting. Prior to negotiating the current form, a similar one was negotiated by ASCAP with the National Association of Exhibition Managers. It exempted all trade show exhibitor personnel -- who hardly attend exhibits to enjoy the music -- from royalty computations. BMI's current blanket license includes half of all exhibitor personnel. That should be changed. Finally, the current $150 minimum payment is unfair to the small and infrequent user of the BMI music repertory. Even considering the limited and qualified credit feature, this is a penalty not a purchase, a liability not a license. It too needs to be changed.

2. Absence of Single-Event Form. Unlike the situation in other industries or fields where both blanket licensing and program licensing by BMI are used, and where the latter is sometimes legally-compelled, the association community has been offered no alternative for a single-event license. An association is told that it must sign a multiple-year, automatically-renewing contract with BMI even for one convention, meeting, or trade show. Because of the unavailability of the BMI or ASCAP repertories, one is effectively compelled to sign licenses with both organizations (giving each an unwarranted benefit from the other's repertory). Although the rates vary somewhat according to the size and frequency of instances in which copyrighted music is used, there is no simple approach for the association that desires to play one song at one event and has no intention of ever using the BMI repertory again. A single-event alternative should be developed.

3. 'Hair Trigger' License Obligation. BMI requires a blanket license agreement by an association upon the performing of the first bar of the first song used at an association-sponsored event. Rates are based upon daily

attendance and anticipate access to the entire BMI repertory. In fact, music is only rarely played or performed all day long at any typical association event because the events are primarily educational. Snippets of music may be used to introduce a particular educational speaker or presentation or to begin an awards or commemorative ceremony; more extended use may occur as background during a reception or dinner; there may even be a few hours of music for dancing at a closing banquet or in a talent show. But most uses are isolated, incidental, infrequent, incomplete, and very brief. To demand a multi-year contract obligation for such inconsequential use of BMI music is unfair and oppressive. There should be some "amnesty" period (for example, one-half hour) for each association-sponsored event before the BMI license obligation, as well as any royalty payment obligation, is even triggered.

4. Reports. BMI requires associations to file a single-event report if the association holds only one event each year using BMI music; otherwise quarterly reports are required for events held in each quarter. This is unduly burdensome. Associations, by virtue of their nonprofit corporate status and federal income tax exempt status, are not in the business of hospitality or entertainment, where such reporting obligations might be considered reasonable. A simple, universal annual report form must be developed and promulgated by BMI.

Conclusion

This letter has outlined the concerns of the association community with BMI's activities in connection with music licensing and the BMI blanket license agreement. ASAE respectfully requests that BMI commit immediate to take steps to correct those activities. A response would be appreciated within thirty days, by February 27, 1992. Until then, ASAE must suspend any cooperation with BMI on music licensing issues.

Sincerely,

R. William Taylor, CAE
President

BMI

VIA AIRBORNE

Thomas G. Annastas
Vice President
General Licensing

February 27, 1992

Mr. R. William Taylor, CAE
President
American Society of Association Executives
The ASAE Building
1575 Eye Street, N.W.
Washington, DC 20005-1168

Dear Bill:

Your letter of January 20, 1992 to Frances Preston has been referred to me for reply.

We at BMI are very much surprised, disturbed and puzzled by your letter. The American Society of Association Executives (ASAE), the Professional Convention Managers Association, Meeting Planners International and the Religious Conference Managers Association and BMI undertook thorough, painstaking negotiations over many months and agreed upon many of the matters which you now totally disavow. In your own literature and releases you described the agreement as "fair and beneficial to all parties" and "... a better agreement that is more representative of the meetings industry." Furthermore, although you now insist upon immediate changes to the structure and terms of the agreement which you negotiated, it was the ASAE and the Task Force which desired a longer term agreement so that rates would be established for over three years and that during those three plus years there would be an opportunity to review the workings of the agreement.

Before addressing some of the matters in your letter, let me make it clear that BMI is ready to meet with you to discuss fully the matters raised in your letter. However, we believe that the appropriate time to address major changes, with the input of all of the members of the Task Force (and others who may be interested), is when the expiration of the agreement grows near.

Although you condemn BMI's efforts at informing and educating users with regard to the negotiated agreement of ASAE, the other members of the Task Force, and BMI, it has been and is our purpose to inform and educate users of music of their responsibilities under the Copyright Law and how to comply with the law. ASAE and

the Task Force reviewed and approved the initial literature prior to its use. I am enclosing the other materials which have been developed and used since that time. If you will take the time to review the material, I do not believe you will find anything offensive and if you do, we will be pleased to discuss it with you.

Please note in reviewing the material that the letter identified as "Follow-Up 3" was a survey letter sent to approximately 9,500 industry members. BMI received approximately 500 responses. Had the industry been more cooperative and responded indicating a reason why further communications should not be made, we would have discontinued our efforts unless verification showed the response was inaccurate.

You raised your concerns about perceived harassment and intimidation before. I am enclosing a copy of my letter of January 21, 1992, to Tom Gorsky of your office which indicates that one, and only one, of the claims which had been made could be attributed to BMI. After review it was found that the response of the BMI telemarketer was understandable under the circumstances. Since that time we have not had any complaints from your Association. Nevertheless, I again assure you that BMI does not believe that any of its contacts are threats and they certainly are not so intended.

With regard to BMI's alleged inflexibility in clarifying or amending the license agreement, as you are aware BMI is limited in the changes it can make by its Consent Decree. We also believe it inappropriate to make changes because definitions and the terms of the agreement were negotiated with your organization and the other members of the Task Force. However, BMI has clarified and will to continue to clarify the terms and conditions of the agreement for users when requested and when appropriate. We would appreciate any specific comments you have as to what terms need clarification.

With regard to the unwillingness to license others, while you may believe it is "often most appropriate and convenient" to license others, BMI believes that the presenters of meetings, conventions, trade shows and the like are responsible for all music used within their events, and we offer licenses to such presenters. We believe this to be the most efficient, reliable and economic method to serve the interests of our affiliated composers, writers and publishers. Even if we did offer licenses to some or all of the parties mentioned in your letter, as the law has been explained to me, the presenter of a show would still remain liable if any of the others did not take a license. Under those circumstances I question whether your approach would really be as beneficial to your members.

Your claims concerning the "Program Structure" appear more suited to a complaint in a legal action than a letter and I do not think this is the appropriate forum to address those claims. Suffice it to say that BMI's licensing practices have been challenged in the past and to date have been fully vindicated, as recently as August, 1991.

I would only add that with regard to your comments about arbitrary targeting of the association community, I believe that my response above concerning the licensing of others applies. With regard to your statements about duplicative charges for music at hotels, I must admit that I do not understand your criticism. If you are stating that since only "industrial trade shows" are excluded from the hotel license and therefore other types of trade shows are not excluded, and that BMI is charging both these trade shows and the hotels fees for the same event, you are incorrect. Our license excludes from the hotel license coverage "industrial or trade shows" (emphasis added). BMI does not charge twice for a single performance. Concerning your comment about our failure to disclose the BMI repertoire, it is totally impractical to issue a list of all the works in our repertoire since the works are in a constant state of change. The repertoire file is available for inspection at our New York offices by means of our computer data base system, and we will advise whether specified works are licensed by BMI if given appropriate information. I am also enclosing for your review a book containing all BMI affiliated composers, writers and publishers. This book has been provided to those requesting affiliate information, and we will continue to make it available.

It is difficult to respond to your criticism of the rates and rate structure. Your comments concerning the cable industry are not applicable to the association industry. The rates for the association industry were negotiated at arms-length with the Task Force and were a compromise of what both sides at the table desired. The final results certainly are not that far from that which the Task Force began with, and your characterization of the rates as exorbitant is totally unfounded. The complexities result as much, if not more, from the needs of the Task Force as the needs of BMI. To address just one of your concerns, the quarterly report forms, it was BMI that proposed a single, annual report form and it was the Task Force that insisted upon quarterly reports.

In conclusion, we at BMI have made every effort to educate and inform the members of the industries of the Task Force about music licensing in a proper fashion. We have sought to continue the process in the following ways: constant training of telemarketing personnel; attendance and participation at conventions, meetings, panels and symposiums (including four ASAE conventions); advertisements and promotional literature; and creation of an educational video which has been provided to over 100 members of the industry, and which we continue to offer. As stated above, we believe the time to address major matters will be at the end of the current term of agreement, and that is why I have not responded to all of the matters in your letter.

I believe that your decision to suspend cooperation with BMI on music licensing issues is unjustified and counter-productive. BMI stands ready to discuss any of these issues or meet with you at any time.

Very truly yours,

Thomas G. Annastas

TGA:mgc

INTRODUCTION

BMI

COMPLETE AND RETURN THE ENCLOSED
BMI-MUSIC PERFORMANCE AGREEMENT BY

AIDGD

Nov. 23,
1990

RE: BMI IS PROUD TO ANNOUNCE MUSIC LICENSING NEGOTIATIONS WITH ASAE, MPI, PCMA AND RCMA ARE COMPLETE...

THE ENCLOSED BMI MUSIC PERFORMANCE AGREEMENT HAS BEEN ENDORSED FOR MEETINGS, CONVENTIONS, TRADE SHOWS AND EXPOSITIONS.

Dear Robert Morris,

Many association directors, meeting planners, and trade show organizers realize that music helps improve many activities at trade shows, expositions and meetings, and is especially vital for dances, banquets, and other speciel functions. Beceuse music plays such an integral part in creating a positive environment, its important for you to understand the rights and obligations involved with playing copyrighted songs.

Today, the new technology of sound and video equipment have made it easy for the Meetings and Conventions industry to use music as an effective marketing tool. However, not all people realize copyrighted music is a songwriters property, protected under the U.S. Copyright Law -- and its use must be paid for as any other business expense.

BMI is the world's largest music licensing organization and is specifically recognised by the U.S. Copyright Law, section 116(e)(3). For fifty years now, BMI has been working with businesses across the U.S. to help them understand and comply with Copyright Law Regulations.

> Very simply, when a business utilizes music from tapes, CD's, videos, live presentations, or any other source, these musical performances require permission from the composer, songwriter, and publisher.*

* The use of copyrighted music without permission is a violation of the U.S. Copyright Law.

But what event organizer has the time or the resources to locate every composer and publisher and negotiate a fee for each and every song?

Here's where BMI can help. We provide your organization and your events unlimited legal use of our entire music catalog -- over 2 million

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compositions by more than 120,000 talented BMI composers, songwriters and publishers. And by working with us, you'll find its the easiest and most practical way to comply with the U.S. Copyright Law. You can sign a single agreement with BMI and pay a per event fee based on the size of your meeting, trade show, convention or exposition.

For instance, in a convention where recorded music is played during meetings (with a total attendance of 500 people), your recorded music fee would be $20, (4 cents per person)...

And, if you held a dinner-dance with live entertainment for 250 people, your live music fee would be $40.

Please refer to (page 4) of enclosed agreement for additional applications. Also, the enclosed BMI Worksheet and Report Form will simplify reporting of your events in January, (the end of the first period 10/1 - 12/31). If you have no events during this period, simply return the form indicating, "no events".

Since our formation in 1939, BMI has operated as a not-for-profit organization, distributing the fees it collects as compensation to affiliated writers and publishers. It's the income songwriters receive from their work, similar to the income you receive from operating your business and events.

Please take time to read the special brochure, "Questions Most Asked About Music In Meetings, Conventions, Trade Shows, and Expositions".

Then complete, sign and return the enclosed Music Performance Agreement by the date printed on the front of this letter.

We'll send you an executed copy for your files, along with a framed Certificate of Compliance and a colorful BMI decal to display proudly. You'll also receive a free subscription to BMI MusicWorld, our exclusive magazine, which will keep you in touch with today's new music talent and trends.

If you have any questions, or need help completing your agreement or report form, please call us toll-free, between 10 a.m. and 6 p.m. E.S.T. at 1-800-669-4BMI.

Thank you for your cooperation. We look forward to receiving your signed agreement.

Sincerely,

Thomas G. Annastas
Vice President
General Licensing

P.S. Enclosed you will find a letter from MPI, ASAE, PCMA, and RCMA endorsing our agreement and explaining their role in the negotiations. Please note this agreement is effective October 1, 1990.

trdein

FOLLOW-UP 1

BMI

AIND2

PLEASE RESPOND BY:

December 31, 1990

SIGN AND RETURN THE ENCLOSED NEWLY NEGOTIATED
BMI MUSIC PERFORMANCE AGREEMENT BY 12/31/90
AND TAKE ADVANTAGE OF THE START DATE OF 10/1/90

Dear Mr. Botti:

Recently we wrote to you regarding the use of copyrighted music in your trade show, convention, meeting or exposition, the requirements of the U.S. Copyright Law, and how easy it would be for BMI to grant you unlimited use of the music by the composers, writers and publishers we represent.

In the material sent to you, BMI pointed out that the presenter of an event using copyrighted music has a responsibility to the creators of that music. After all, the presenter is gaining a business benefit by using the music.

So, whether you present one meeting, trade show, or convention a year, or your trade shows increase in 1991 (published reports indicate an increase next year)...the creators of that music are working for you...but without a BMI Music Performance Agreement, the use of BMI music is not authorized by the songwriters, composers and publishers we represent.

Frankly, the easiest way to be sure that the BMI music you use is yours to use legally is to obtain a Music Performance Agreement from BMI. And, if you return the signed agreement to us by December 31, 1990, you'll be able to take advantage of the October 1, 1990 start date, as negotiated with the Music Licensing Task Force (ASAE, MPI, PCMA, and RCMA).

This means that BMI is waiving license fees for the 9-month period January through September, 1990 provided that the agreement is signed and returned to BMI by December 31, 1990.

The newly negotiated and endorsed (please refer to attached letter from the Music Licensing Task Force) BMI Music Performance Agreement for Trade Shows, Conventions, Meetings and Expositions is an easy and cost efficient way to comply with the U.S. Copyright Law. The agreement gives you legal access to over 2 million BMI songs and musical compositions by more than 120,000 songwriters, composers and publishers.

If we do not receive the enclosed agreement, completed and signed by December 31, 1990, BMI has the right to protect the interests of its songwriters, composers and publishers for unauthorized use of their music, prior to the agreement start date of October 1, 1990.

If you have any questions about BMI, the Copyright Law, or the penalties involved for non-compliance, please call us toll-free, anytime during the business day, 10 A.M. to 6 P.M. E.S.T. at 1-800-669-4BMI.

Sincerely yours,

Michael J. Murphy

Michael J. Murphy
Manager, Marketing Communications
BMI Licensing

P.S. If you have any questions about your responsibilities under the U.S. Copyright Law, please consult your legal counsel or have your counsel call us at the number above. If you are already licensed with BMI or have recently sent your agreement, we greatly appreciate your cooperation. Also, if you signed our previous Music Performance Agreement for Trade Shows and Conventions for 1989, we will apply all payments made for events which occur after 10/1/90.

BMI

FOLLOW-UP 2

PLEASE RESPOND BY:

June 7, 1991

AIDGP

Dear Patricia Appleby,

As you know, BMI finalized our new Music Performance Agreement for meetings, conventions, trade shows and expositions last fall. This agreement was the product of negotiations with ASAE, MPI, PCMA and RCMA.

Since that time, we have worked to communicate to you the facts about the music licensing process through various channels, including:

- our letters to you and other members of your industry;
- our informational ad placements in industry publications;
- our attendance at national industry-sponsored trade shows;
- and our participation in regional seminars and panels.

Many have already responded to our correspondence. However, we understand that some planners and organizers have specific concerns and needs which they would like to have addressed. Because we have not heard from you, we believe you may be among that group.

To meet these needs and concerns, BMI has created a special team of trade show licensing consultants. They are in close contact with the BMI Task Force which worked on the new agreement.

To speak with one of our special trade show consultants, please call our meetings and conventions toll-free helpline: 1-800-669-4264. Ask the operator for a Trade Show Specialist.

Our specialists are knowledgeable about all aspects of trade show licensing. Once they have addressed your questions and concerns, please complete the enclosed agreement and return it with the appropriate remittance.

We look forward to welcoming you as a BMI licensee.

Sincerely,

Michael J. Murphy

Michael J. Murphy
Manager, Marketing Communications
General Licensing

Enc.
trd1f2

BMI

FOLLOW-UP 3

INQUIRY VARIABLE DATA. LINE 1

CONTACT DATA BASE ACCESS KEY
CUSTOMER FIRST AND LAST NAME
CUSTOMER TITLE
CUSTOMER COMPANY NAME
CUSTOMER ADDRESS LINE 1
CUSTOMER CITY, CUSTOMER STATE CODE CUSTOMER ZIP CODE FIRST 5 AND LAST 4

Dear CUSTOMER FIRST NAME CUSTOMER LAST NAME:

As BMI has informed you in previous communications, those who present meetings, conventions, trade shows and other special events which include music must meet the obligations of the U.S. Copyright Law. The Law states that no one can perform copyrighted music without the permission of the songwriters, composers and publishers. Music is their product, therefore they are entitled to be compensated for its use.

More than 120,000 songwriters, composers and publishers have designated BMI to license the public performance of their music. When you enter into an agreement with BMI, you gain authorization to use all of the music we represent.

To communicate your specific needs to us, please check the appropriate box below and return this page or your completed BMI Music Performance Agreement and remittance. A postage-paid envelope is enclosed for your convenience.

{ } Our event(s) include music. I have completed the BMI Music Performance Agreement & enclosed the appropriate remittance.

{ } We use the services of a production company , booking agent or other outside source to organize our events.

Name:_____Phone #:(___)_____

Address:_____

{ } We do not play any music at any of our events.

{ } We have not yet scheduled our upcoming events.

If you have any questions regarding the U.S. Copyright Law or the service which BMI performs, please call our Trade Show Licensee Helpline at (800) 669-4264 weekdays, between 10 a.m. and 6 p.m. (Eastern Time).

I appreciate your giving this matter your immediate attention.

Sincerely,

Michael J. Murphy

Michael J. Murphy
Manager, Marketing Communications
General Licensing

ts1fu3

200 Schultz Drive, Red Bank, NJ 07701 (800) 669-4264

BMI

FOLLOW-UP 4 To be mailed in February, 19

Variable Date

CONTACT KEY
CUSTOMER FIRST LAST NAME
TITLE
COMPANY NAME
ADDRESS
CITY, STATE ZIP

TRADE SHOWS GROUP 1 FU4

The copyrighted music that you use in your meetings, conventions, trade shows and other events is protected by the U.S. Copyright Law.

Dear:

In the literature that BMI previously provided, we explained the requirements of the U.S. Copyright Law concerning the use of copyrighted music. The Law states that no one may publicly perform copyrighted music without the permission of the songwriters, composers and publishers who own it.

BMI is continually striving to make music licensing easier to understand for you and others in your industry. We recently produced a new informational video that explains the licensing process and answers important questions. We have also simplified our licensee reporting process.

One of our primary objectives is to clear up any doubts or questions you may have about your legal obligations. Please call our toll-free information line, 1-800-669-4264 weekdays, between 10 a.m. and 6 p.m. (Eastern Time) to have your questions addressed.

I encourage you to complete and return the enclosed agreement immediately. This will insure that you have complied with the Copyright Law's requirements for all of the BMI music you use in your events.

Sincerely,

Michael J. Murphy
Manager, Marketing Communications
General Licensing

TSGIF4.

320 West 57th Street, New York, New York 10019-3790 (212) 586-2000 Telex 127823

BMI

CONVENTION CENTER
INFORMATIONAL MAILING

August 9, 1991

AG65Z
Michael Murphy
Marketing Manager
BMI
445 West 54th St. Apt 5D
New York, NY 10019

Dear Michael Murphy:

As an important venue in the meetings and conventions industry, you are probably aware that your renters or leasees--whether they are associations, corporations, or other businesses--must meet certain responsibilities when they use copyrighted music.

Because your convention center works closely with many of the businesses that are directly affected by the U.S. Copyright Law, we should work together to provide your leasees with information vital to their presentation of special events.

BMI helps businesses meet their copyright obligations. The literature in the enclosed BMI informational packet explains the Copyright Law, music licensing and BMI in greater detail. We would greatly appreciate your distributing these packets to your leasees. We will send you additional packets at your request.

Please review the enclosed materials carefully:

-- "Questions Most Asked About Music in Meetings, Conventions..."

-- "BMI in Brief"

-- "The Legal Aspects of Performing Copyrighted Music"

-- BMI MusicWorld: Special Licensing Issue

-- BMI Music Performance Agreement - Meetings, Conventions...

Also, many convention centers and facilities in this country include a standard clause in their lease agreements specifying the leasee's responsibilities for BMI fees and other copyright obligations. If you don't have such a clause in your standard agreement, you might want to consider adding one. This can insure that your leasees are aware of their responsibilities.

We thank you for your assistance in providing this valuable service. If you have any further questions or would like to have one of our licensing executives contact you, please call us at 1-800-669-4264.

Sincerely,

Michael J. Murphy

Michael J. Murphy
Manager, Marketing Communications
General Licensing

cnvctr

BMI

MEETING PLANNERS INFORMATIONAL MAILING

August 9, 1991

CUSTOMER FIRST AND LAST NAME
CUSTOMER COMPANY NAME
CUSTOMER ADDRESS LINE 1
CUSTOMER CITY, CUSTOMER STATE CODE CUSTOMER ZIP CODE FIRST 5 AND LAST 4

Re: Important Copyright Information
for Meeting Planners and Producers

Dear CUSTOMER FIRST NAME CUSTOMER LAST NAME,

In the past year you may have read about the U.S. Copyright Law and how it affects the meetings, conventions, trade shows and expositions industry. If so, you are aware that when copyrighted music is used for a meeting, convention, or similar event, the presenter of the event must obtain permission to use this from the people who created it. The simplest and most cost-effective method of meeting this requirement is to obtain a music performance agreement.

BMI is the world's largest music licensing organization. Last fall we completed negotiations with four of the leading associations representing the convention and trade show industry -- ASAE, MPI, PCMA and RCMA. All four associations endorsed the new Music Performance Agreement.

In the months since, BMI has worked to inform trade show and meeting presenters about the responsibilities involved with playing copyrighted music and the advantages of licensing with BMI. Despite these efforts, some industry members remain unaware of their copyright obligations, and others have questions about the music licensing process.

Because your company works closely with many of the businesses that are directly affected by the U.S. Copyright Law, we would like to work with you to provide the presenters and sponsors of meetings and trade shows with the information they need.

The enclosed literature was created to meet this purpose. Please look over these materials carefully:

- BMI MusicWorld: Special Licensing Issue
  This is the second special licensing edition of this BMI-published magazine. It includes articles that address a wide variety of questions music users often ask.

- "The Legal Aspects of Performing Copyrighted Music"
  This brochure explains more about the U.S. Copyright Law and answers questions about the legal nuances of copyright compliance.

- "Questions Most Asked About Music..."
  Members of the meetings, conventions, trade shows, and expositions industry have specific questions about music licensing and BMI. This brochure answers many of these questions.

I understand that trade show presenters often refer to meeting planners and producers for information and advice on many aspects of their events. I am sure these materials will provide you with the facts you need for answering questions on music licensing for your clients.

If you would like a supply of any or all of the enclosed, or if you would like to discuss this topic in more detail, please call our toll-free information line: 1-800-669-4264.

I look forward to working with you.

Sincerely,

Michele A. Reynolds

Michele A. Reynolds
Director, Marketing & Industry Relations
General Licensing

Enc.
mtpli

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200 Schultz Drive, Red Bank, NJ 07701 1-800-669-4264

BMI

NEW INTRODUCTION LTR
1992
CORPORATIONS

February 7, 1992

AJX98

RE: Copyright Obligations for Corporate Music Use

Dear Mr. Wilson:

Today, the improved technology of sound and video equipment has made it easy for corporations to use music as an effective marketing tool. But despite music's increasing popularity among the business community, some corporate decision makers are unaware that the use of music must be paid for just like any other business expense.

The U.S. Copyright Law recognizes music as the property of the songwriters, composers and publishers who create it and grants them an exclusive "performing right." This means that no one can play or perform copyrighted music in a public place without permission. Under the Law's definition of "public," this requirement applies to music used in corporate events such as meetings, conferences, and parties; background music in corporate lunchrooms, fitness centers and manufacturing plants; and even music-on-hold.

If your corporation uses music in any part of its day-to-day operations or for special meetings and events, you must meet your legal obligations. BMI, recognized by the U.S. Copyright Law as a licensor of music performing rights, can authorize your company's use of more than two million songs through a BMI Music Performance Agreement.

Please take a few minutes to read the enclosed brochure for more details about BMI and music licensing. Then, if you have no further questions, complete the enclosed agreement (effective January 1, 1992) and return it in the postage-paid envelope provided.

If you do have questions or need help completing the agreement, please call us toll-free at 1-800-669-4264, between 10 a.m. and 6 p.m. Eastern Time.

Sincerely,

Thomas G. Annastas

Thomas G. Annastas
Vice President
General Licensing

ts5int

200 Schultz Drive, Red Bank, NJ 07701 (800) 669-4264

NEW INTRODUCTION LTR
1992 ASSOCIATES

BMI

Variable Date

CONTACT KEY
CUSTOMER FIRST LAST NAME
TITLE
COMPANY NAME
ADDRESS
CITY, STATE ZIP

RE: Copyright Obligations for Association Music Use

Dear:

Today, the improved technology of sound and video equipment has made it easy for associations to use music as an effective marketing tool. But despite music's increasing popularity among the business community, some association decision makers are unaware that the use of music must be paid for just like any other business expense.

The U.S. Copyright Law recognizes music as the property of the songwriters, composers and publishers who create it and grants them an exclusive "performing right." This means that no one can play or perform copyrighted music in a public place without permission. Under the Law's definition of "public," this requirement applies to music used in events such as trade shows, conventions, meetings, conferences, and parties; the Law even includes background music and music-on-hold.

If your association uses music in any part of its day-to-day operations or for special meetings and events, you must meet your legal obligations. BMI, recognized by the U.S. Copyright Law as a licensor of music performing rights, can authorize your organization's use of more than two million songs through a BMI Music Performance Agreement.

Please take a few minutes to read the enclosed brochure for more information about BMI and music licensing. Then, if you have no further questions, complete the enclosed agreement (effective January 1, 1992) and return it in the postage-paid envelope provided.

If you have questions or need help completing the agreement, please call us toll-free at 1-800-669-4264, between 10 a.m. and 6 p.m. Eastern Time.

Sincerely,

Thomas G. Annastas
Vice President
General Licensing

320 West 57th Street, New York, New York 10019 (212) 586-2000 Telex: 127823

SURVEY LTR TO
TRADE SHOW LICENSEES

Ms. First Name Last Name
Trade Show Assn
123 Foreign Drive
Anytown, USA 98809

RE: Account Number

Dear First Name Last Name:

In response to requests from many individuals within your industry, BMI is conducting a survey to determine whether annual or quarterly reporting is more favorable.

Before we make a change in the reporting requirements, we would like to have your feedback. It would be greatly appreciated if you could complete the following survey and return it in the postage-paid envelope provided.

Please check all that apply:

___ We present only one (1) event with music each year
Month of event: _____

___ We present more than one (1) event with music each year
# of events with music per year: _____
Months of your events: _____ _____
_____ _____
_____ _____

___ We prefer quarterly reporting

___ We present more than one (1) event with music per year and would like to have our reporting requirement changed from quarterly to annually. (Note: If reporting is changed to annually, we request that you pay an estimated fee in advance for the coming year, based on the previous year's events. An actual report will be required at the end of the year and any adjustments will be made then.)

We look forward to your response and will continue to make the administration of this agreement easier for you and your staff.

Thank you for your continued cooperation.

Sincerely yours,

Robin Chalfa
Trade Show Coordinator
Licensee Services

tyce45

BMI

Thomas G. Annastas
Vice President
General Licensing

January 22, 1991

Mr. Thomas Gorski
The ASAE Building
1575 Eye Street, NW
Washington, DC 20005

Dear Tom,

After reviewing the names that you submitted to me, I was able to ascertain that the system reflects that BMI"s Telemarketing Department had contact with only one, John Bentine. The results of the call, per the telemarketer, are indicated on the attached copy of the tracking screen and was based on an incoming call from Mr. Bentine. Since in our discussion, you stated Mr. Bentine is not thrilled with the concept of licensing, I don't know if it would do any good for me to call.

As far as the other persons you listed, I am attaching copies of their tracking screens and would be more than happy to contact them to correct any misperceptions and also clarify that our records reflect that it was not BMI that initiated the contacts which led them to lodge complaints. I would also like to know if Cliff Harvison is the contact at the National Tank Truck Carriers, since our records indicate the contact to be A. Rosenbaum. I also could not locate Jim Feely, Association of Legal Services, on our system, perhaps if you gave me his telephone number I could do another search.

As I stated to you, BMI is committed to educating all of your members, as well as, all other industries about the Copyright Law and would look to both you and Bill for any assistance you might offer. We are more than willing to continue our ongoing dialogue both regionally and nationally. Our in-house staff is currently working on a video which will also address many questions and issues and when the outline is prepared I will send you a copy. Please let me know how you feel we should handle these and other situations as soon as possible and thank you for your assistance.

Sincerely,

Thomas G. Annastas

TGA:mc
cc: Bill Taylor
Michelle Reynolds
Michael Murphy
Marvin Berenson

320 West 57th Street, New York, NY 10019 (212) 830-2530 Fax (212) 489-2368

EXHIBIT 2

MEETINGS INDUSTRY

Music Licensing Task Force

BOARD

E. Able, CAE
...n Association of Exposi...
...ton, DC

...Schoenbaum, CAE
...n Hotel & Motel Asso...
...gton, DC

...an T. Bono
Peters Limited
...o, IL

...rd Goldblatt
...nder Company, Inc.
...ington, DC

...t J. Bonacci, Ph.D., CAE
...ucare Financial Management
...ion
...ester, IL

...Sallie Blakeman, CMP
...tom Productions, Inc.
...rt, MI

...ene C. Lofgren
...t Marketing Association,
...rt, MI

...t E. Anderson
...le Goss Feiman & Bono
...ington, DC

...E. Evans
...ational Convention Management
...ion
...ngham, AL

...Hall
...e Hall Productions
...mit, MD

...ard H. Doyle
...el Baker & Hartzell
...ington, DC

...Dewayne B. Hendricks, CMP
...ington Conference Management
...ion
...napolis, IN

...ert C. Green, CMP
...ional Planners International
...ion, TX

William Taylor, CAE
...erican Society of Association
Executives
...ington, DC

The Music Licensing Task Force and BMI have developed a new Music Performance Agreement specifically for the meetings, conventions, trade shows and expositions industry.

The Music Licensing Task Force, comprised of representatives of the American Society of Association Executives, Meeting Planners International, the Professional Convention Managers Association and Religious Conference Management Association, recommend that their memberships consider the voluntary agreement as their most efficient means of complying with the copyright laws which govern the performance of music at meetings, trade shows, conventions and expositions.

The U.S. Copyright Law requires that permission be obtained before copyrighted musical works can be publicly performed. BMI, specifically recognized by the U.S. Copyright Law, collects license fees from organizations and businesses for the music played at meetings, conventions, trade shows and expositions.

We are pleased that the Agreement between BMI and the Task Force provides that no fees are required by BMI until October 1, 1990. A copy of the Agreement is enclosed.

We urge you to review the enclosed material and encourage you to obtain the appropriate license, comply with the reporting requirements and pay the applicable fees. We emphasize that the agreement is a form agreement which the Task Force believes includes terms which are reasonable and are tailored to the convention and meeting industry, but which are not binding on any group until it individually contracts with BMI.

Thank you for your attention. BMI provides a toll-free number to assist you with any questions: 1-800-669-4264.

EXHIBIT 3

asae
ASSOCIATION REPORT

A SUPPLEMENT TO *ASSOCIATION MANAGEMENT* NOVEMBER 199

Pay to Play

Model Agreements Facilitate Music Copyright Compliance

The next time your association plays a song at one of its meetings, it probably will have to pay a fee for the privilege. That's because BMI (Broadcast Music Incorporated) and ASCAP (the American Society of Composers, Authors, and Publishers)—New York City-based organizations that protect the rights of their respective affiliates or members by licensing music users, collecting a fee, and distributing approximately 80-85 percent of the fee to copyright owners—have begun aggressively enforcing the United States Copyright Law with regard to associations.

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Questions and Answers About Music Licensing 2
Fee Schedules 4
How to Calculate the Fees .5
Getting Informed 6
Three Options That Don't Involve BMI or ASCAP 7
Contracts to be Mailed 8

Under the copyright law, the public performance of copyrighted music requires permission from the copyright owner or its licensing agent. BMI and ASCAP are licensing organizations; if the copyright of music you use at a meeting belongs to a BMI affiliate or ASCAP member, you will have to pay a fee to BMI or ASCAP to obtain permission to use the music. Violators of the copyright law face penalties of up to $100,000 per piece of music.

Both licensing groups have developed separate model agreements that associations can use to obtain the right to use any copyrighted music—live or mechanical (recorded)—in BMI's and ASCAP's repertories played during meetings. ASAE and a Music Licensing Task Force comprising meeting-industry associations were instrumental in negotiating these two easy-to-understand agreements, which all associations will be able to use when licensing the rights to use live and recorded music at their meetings.

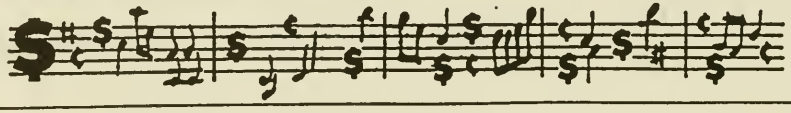
In order to comply with the copyright law, associations may opt to

- sign the newly released BMI agreement or ASCAP agreement or both;
- negotiate their own agreement(s) with either or both organizations;
- approach the copyright owner of the music for a license, which can be practical if only using a small, specialized body of music at a meeting;
- use only music in the "public domain" (Songs that are in the public domain—whereby the copyright has expired—are not found in either BMI or ASCAP's repertory. Since the copyright has expired and thus no fees need to be paid to the composer or his or her relatives, associations may use music that is in the public domain at no cost.); or
- sign an agreement with an organization that produces its own songs and thus owns the copyright (see "Three Options That Don't Involve BMI or ASCAP," page 7).

Although BMI and ASCAP have had the right to collect fees for copyrighted musical works for many years, they only recently drafted music licensing proposals for the association-meeting industry to begin aggressively enforcing compliance. Both groups agreed to revise their initial model agreements, thanks to the negotiation efforts of ASAE and the task force.

According to ASAE President R. William Taylor, CAE, ASAE and the task force stepped in because the initial proposals contained nuances that were unacceptable to the meetings industry. One proposal, for example, would have required meeting planners to pay a fee for live and recorded music based on the number of all attendees registered for a conference, even if the music was used only for a breakout event that only some attendees would attend. Under the current agreements, associations are only required to pay a per-head or group fee for those people attending the

(Continued on page 8)



Clearing Up the Confusion

Questions and Answers About Music Licensing

1. What is music licensing?

In short, it's permitting others to use one's music for a fee. Music licensing is the granting by the owner of the right to publicly perform copyrighted music to another, thus permitting the recipient to perform the music in public. In return, the recipient of the right—the licensee—pays the owner a royalty fee.

2. Why do we have to pay for music we use?

Why do we pay for books? Because authors write them and want to get paid. It's not any different for music composers. The creators of music make their money—and often their living—by getting paid for the music they write.

3. What are the legal reasons we have to pay for licensed music?

The United States Copyright Law gives the owner of music copyrights the right to be paid for public performance of that music.

4. How do you find out if a song is copyrighted?

You may write to BMI (Broadcast Music Incorporated) or ASCAP (the American Society of Composers, Authors, and Publishers) to find out if they license a particular song. BMI's address is 320 W. 57th St., New York, NY 10019. ASCAP's address is 1 Lincoln Plaza, New York, NY 10023.

Or you may write to the Library of Congress to find out if a song is copyrighted or if the music is free (i.e., if the song(s) is considered in the "public domain."). You may get this information by doing research at the Library of Congress in Washington, D.C., or by directing your request in writing to the Library of Congress, Copyright Office, Attn: Reference Center, Washington, DC 20559. The Library of Congress charges $10 an hour for any research it conducts.

5. What are BMI and ASCAP? What is the nature of the model agreements they have negotiated?

BMI and ASCAP protect the rights of their members (authors, composers, and publishers of music) by licensing users, collecting a fee, and distributing approximately 80-85 percent of the fee to copyright owners.

Under the new agreements, BMI and ASCAP are collecting royalties on behalf of copyright owners. Associations, in turn, pay a fee—or royalty—for the use of live or recorded music contained in either BMI's or ASCAP's repertory. Thus, when an association signs one or both of the new agreements, it will be agreeing to pay royalties, according to the terms of the agreement(s), for the right to perform or play copyrighted music at the association's events, including meetings and trade shows.

6. When do the model agreements take effect? Do fee levels change each year?

BMI's agreement began in October and runs through Dec. 31, 1993; ASCAP's agreement takes effect Jan. 1, 1991, and runs through Dec. 31, 1994. (See "Fee Schedules" to determine fee levels for each year, page 4.)

7. Do you need a license if you don't charge an admission or registration fee at your meeting?

Yes. The royalty fee is based on either the number of attendees attending or registered for a performance of music, not on your admission or registration costs. Use of live or recorded music at any event—meeting, trade show, convention, and so forth—qualifies as a public performance of music and therefore requires payment of a royalty to the copyright owners.

8. Is there a minimum cutoff below which a meeting—say with fewer than 10 people—does not require a license?

No, both BMI and ASCAP charge a per attendee fee, with no minimum number of attendees. BMI's minimum fee for 1990 is $20 for 150 or fewer; ASCAP's minimum fee for 1991 and 1992 is $25 for 250 people or fewer.

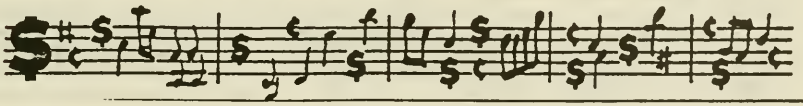
As a practical matter, a small enough gathering might escape anybody's attention. However, there is both the ethical issue to consider and the fact that both BMI and ASCAP have "music police"—employees who travel the country looking for commercial establishments playing music without licenses. They have been known to visit some very small establishments—small pizza parlors playing a single radio to patrons, for example—and demand licenses from the owners.

9. Does one license cover an association if it plays live and/or recorded music at several different events within one meeting?

Yes, only one license is needed. Fees for music depend on the number of attendees at each event and whether live or recorded music, or both, are performed. For recorded music, the number of attendees—essentially, all in attendance except those working to put on the event—determines the fee, with each organization charging an amount to be multiplied by the number of attendees.

For live music, each agreement contains a fee schedule,

(Continued on page 3)



Clearing Up the Confusion

...Questions and Answers About Music Licensing

(Continued from page 2)

which sets fees according to a scale based on the number of people attending the specific event or function at which the live music is performed. For example, under BMI's agreement, the fee for a 1990 function at which live music is performed is $25 if 200 people attend and $125 if 1,000 attend.

Because these are "blanket" agreements permitting the performance of the entire repertory of each organization, the attendance and the method of performance (live or recorded) and not the selection of music—determine the royalty fees.

The model agreements, therefore, eliminate concerns about the need to monitor and keep a record of every song played, who owned the copyright, and so forth. The only data that must be reported to the licensing organization is whether music was performed, whether it was live or recorded, and how many people were in attendance when the music was performed. Based on that information, the BMI and ASCAP fee schedules will tell you how much money you owe.

10. For some organizations, using music at meetings is the exception rather than the rule. What if an association uses music at an event one year, then reverts to its "no music" pattern in succeeding years. Does the association need a license for the year it uses music? And what happens when the association goes back to its old pattern of not playing music?

With the ASCAP license, there is a minimum fee of $50 per event at which any music is performed. However, if no music is performed at any event, no fee is owed. Thus you can sign that agreement and if you revert to old ways owe nothing. BMI, on the other hand, has an annual minimum of $125 for 1990, climbing to $150 for 1991 and 1992, and $175 for 1993. You pay this for the first event of the year at which music is performed. If this amount is more than the license fee owed for that event, the association gets a credit against subsequent events that year.

11. If you hold one or two dinner dances or a couple of small events with live music, can you build into a contract that it is the performers' responsibility to secure a license with BMI and ASCAP?

No, BMI and ASCAP will not license performers. You can contract with someone else involved in the event to pay the amount of the required royalty fees, but as the organizer and producer of the event at which copyrighted music is performed, you are responsible for payment of the royalty fees to the owners of the copyright, generally BMI and ASCAP.

12. How do multiple-year contracts work?

The model agreements are for three plus years for BMI and for four years for ASCAP. BMI's contract began in October 1990 and extends to Dec. 31, 1993; ASCAP's contract begins on Jan. 1, 1991, and extends to Dec. 31, 1994. They provide for automatic renewal for additional one-year terms, unless otherwise terminated.

13. What if you have allied groups that you don't control that meet concurrently at your meeting? Are you responsible for the music played at their events?

You are only responsible if the event is sanctioned or approved by your organization. If you have put your seal of approval on that event, then you are responsible. We suggest associations require allied groups to sign their own licensing agreements and to indemnify the association should there be a claim for additional royalties because of the allied group's performance of music.

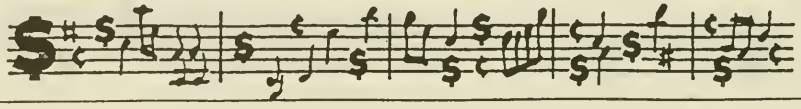
14. Are you going to be at the maximum fee level on both groups if you have a large trade show?

Each organization's agreement contains a maximum fee for both live and recorded music performed at an entire event up to 14 days long and a daily maximum fee for live music performed at the event or related functions. Thus, for an event that has more than 10,000 in attendance, the maximum daily live music fee for the first contract year is $500 for both BMI and ASCAP. During the first year under both agreements, the maximum fee for all music for a single event of 14 days or less is $4,000 for the first year. And remember, the fee is based on the attendees at the event at which music is played, so if live music is used for a reception in connection with the trade show at which only a fraction of the 10,000 is in attendance, then your fee is based on the fraction and not on the 10,000.

15. If your exhibitors are playing music or have live music in their booths, are you responsible for their music licensing fee? Is the count then to include all 6,000 people who pass through the trade show?

Yes, you are responsible in both instances. However, be sure to ask exhibitors if they already have licenses or if their music is original. If exhibitors have original music for which they own the copyright, no licensing fee would be required. If they don't have a license and their music is not

(Continued on page 6)



Fee Schedules

BMI Agreement

Recorded Music Fee Per Event

YEAR	FEE RATE	YEAR	FEE RATE
1990	$.040 per attendee	1992	$.045 per attendee
1991	$.045 per attendee	1993	$.048 per attendee

To determine the recorded music per event fee, multiply the applicable fee rate by the number of attendees.

Daily Live Music Fee

	NUMBER OF ATTENDEES					
YEAR	Up to 150	151-250	251-400	401-800	801-1,500	1,501-2,500
1990	$20	$25	$40	$80	$125	$175
1991-92	$25	$30	$45	$90	$140	$195
1993	$25	$30	$50	$95	$150	$205

	NUMBER OF ATTENDEES					
YEAR	2,501-3,500	3,501-4,500	4,501-6,000	6,001-8,000	8,001-10,000	10,000 & over
1990	$225	$275	$325	$375	$425	$500
1991-92	$250	$300	$360	$415	$470	$560
1993	$265	$325	$380	$440	$510	$595

ASCAP Agreement

Recorded Music Fee Per Event

YEAR	FEE RATE	YEAR	FEE RATE
1991	$.045 per attendee	1993-94	Rate per attendee to be determined by Consumer Price Index*
1992	$.045 per attendee		

To determine the recorded music per event fee, multiply the applicable fee rate by the number of attendees.

Daily Live Music Fee

	NUMBER OF ATTENDEES					
YEAR	Up to 250	251-500	501-750	751-1,000	1,001-1,500	1,501-2,000
1991-92	$25	$50	$75	$100	$125	$150
1993-94	Rates to be determined by Consumer Price Index*					

	NUMBER OF ATTENDEES					
YEAR	2,001-3,000	3,001-4,000	4,001-5,000	5,001-7,500	7,501-10,000	10,001 & over
1991-92	$200	$250	$300	$350	$400	$500
1993-94	Rates to be determined by Consumer Price Index*					

*The license fees for 1993-1994 shall be the license fees for 1992, adjusted in accordance with any increase in the national Consumer Price Index between October 1989 and the October preceding the calendar year in question. Adjustments to license fees shall be rounded to the nearest 1/2 cent for mechanical music, to the nearest $5 for live music, to the nearest $10 for the minimum fee payable, and to the nearest $50 for the maximum fee payable.

How to Calculate the Fees

Calculating fees is somewhat complicated, but taking a look at a few hypothetical situations can help you understand how the BMI and ASCAP fee schedules work.

In the following examples, we assume that 1,500 people paid or registered to attend the event and that 300 exhibitor personnel were also present. Because half the exhibitor personnel are counted as attendees, the total number of attendees in these examples is 1,650. The meeting is held March 30-31, 1991.

Example 1

Recorded music is performed each day of the event by exhibitors on the trade show floor, during a seminar in a meeting room, and at an awards banquet; no live music is performed at the event.

For either BMI or ASCAP, calculate the license fee for the event as follows:

1,650 (number of attendees) x 4.5 cents (recorded music fee) = $74.25

Example 2

Live music is performed on the main exhibition floor during two days of the event; no other live music and no recorded music is performed at the event. Calculate the license fee for the event as follows:

BMI: $195 (daily fee for live music performed on the main exhibition floor with 1,650 attendees) x 2 days = $390

ASCAP: $150 (daily fee for live music performed on the main exhibition floor with 1,650 attendees) x 2 days = $300

Example 3

Live music is performed on the main exhibition floor during two days of the event; on each of those same two days, live music is also performed at a dinner party for 350 people; no other live music and no recorded music is performed at the event. Calculate the license fee for the events as follows:

BMI: $195 (daily fee for live music performed on the main exhibition floor with 1,650 attendees) x 2 days = $390 plus $45 (daily fee for live music performed at functions occurring someplace other than on the main exhibition floor—that is, the dinner parties—with 350 attendees) x 2 days = $90. BMI: The total license fee for this event is $480.

ASCAP: $150 (daily fee for live music performed on the main exhibition floor with 1,650 attendees) x 2 days = $300 plus $50 (daily fee for live music performed at functions occurring someplace other than on the main exhibition floor—that is, the dinner parties—with 350 attendees) x 2 days = $100. ASCAP: The total license fee for this event is $400.

Example 4

Recorded music is performed each day of the event by exhibitors on the trade show floor, during a seminar in a meeting room, and at an awards banquet; live music is performed on the main exhibition floor during the two days of the event; and on each of those same two days live music is also performed at three separate functions, all of which occur someplace other than on the main meeting floor and which have setups for 250 people, 850 people, and 50 people, respectively; no other recorded or live music is performed at the event. Calculate the license fee for the events as follows:

BMI: 1,650 (number of attendees) x 4.5 cents = $74.25 plus $195 (daily fee for live music performed on the main exhibition floor with 1,650 attendees) x 2 days = $390 plus $140 (daily fee for live music occurring at functions someplace other than on the main exhibition floor with a total of 1,150 attendees) x 2 days = $280. BMI: The total license fee for this event is $744.25

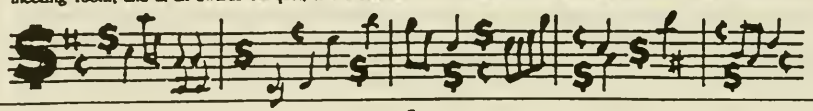
ASCAP: 1,650 (number of attendees) x 4.5 cents = $74.25 plus $150 (daily fee for live music performed on the main exhibition floor with 1,650 attendees) x 2 days = $300, plus $125 (daily fee for live music occurring at functions someplace other than on the main exhibition floor with a total of 1,150 attendees) x 2 days = $250. ASCAP: The total license fee for this event is $624.25.

Getting Informed

Learn about the new music licensing rules and how they will affect you and your organization. Here is a synopsis of ASAE's seminars on the topic.

- **November 16:** The 4th Annual Legal Symposium, Loews L'Enfant Plaza Hotel, Washington, D.C. A plenary session, "How Will the Music Royalty Issue Finally Be Resolved?" from 11:20 a.m. to 12:30 p.m. Speakers include moderator Jonathan T. Howe, senior partner, Howe & Hutton, Ltd., Chicago; James E. Anderson, partner, Loomis Owen Fellman & Howe, Washington, D.C.; Sheldon L London, general counsel, National Association of Exposition Managers, Aurora, Ohio; Marvin Berenson, vice president and general counsel, BMI, New York City; and L. Barry Knittel, director of licensing, ASCAP, New York City. The Legal Symposium costs $175 for members; $200 for nonmembers.
- **November 16:** Issue Briefing, Loews L'Enfant Plaza Hotel, Quorum Room, Washington, D.C. An issue briefing will also be held from 2 p.m. to 4:30 p.m. at the Loews L'Enfant Plaza Hotel. Howe, Anderson, Berenson, and Knittel are also scheduled to speak. The cost is $25 per person.
- **March 6:** ASAE Spring Convention & Exposition, Taj Mahal, Atlantic City. The session "Music Licensing...Not Only Do We Need to Pay the Piper, We Now Need to Pay the Composer," from 10:15 a.m. to 11:45 a.m. and again from 2:45 p.m. to 4:15 p.m. Howe and Albert J. Sunseri, CAE, vice president of education and member services, Healthcare Financial Management Association, Chicago, will serve as speakers.

For information or to register for these sessions, call ASAE at (202) 626-2757.



Clearing Up the Confusion

...Questions and Answers About Music Licensing

(Continued from page 3)

original, you may want to ask them to contribute a certain amount toward the licensing fee. And yes, the count is 6,000.

16. How will the licensing organizations know if you are playing copyrighted music at your meeting?

BMI and ASCAP have offices throughout the United States. The organizations can easily pick up a *Chicago Tribune*, for example, which lists daily the conventions and expositions in that city and anticipated attendance. BMI and ASCAP clip those items. The appropriate organization will call you if it hasn't heard from you. If one of the licensing groups calls you, it will inform you of your obligation to have a license to publicly perform copyrighted music. If you refuse to sign and then put on your event and perform music, you have a good chance of being taken to court. If there is substantial resistance among a number of organizations, the licensing organizations will likely bring some number of "high profile" lawsuits to keep all groups in line.

There is also the ethical issue. We have an ethical responsibility to comply with this law. When we have a meeting, we don't try to avoid any of the other laws, rules, and regulations. Avoiding this law is stealing, because copyrighted pieces of music belong to the composers, not to us.

17. Is some music—for example, that of the Barbershop Quartet Association—exempt from music licensing?

Yes. The Barbershop Quartet Association is in a unique situation because it has its own license that it has negotiated. This example should be a reminder to all associations: Anyone can negotiate an agreement with BMI and ASCAP. You're not bound by the current agreement, which was negotiated simply to create a uniformity and understanding in the meetings industry.

18. Is synchronization of music covered under this agreement?

No. Synchronization rights permit you to record the music in timed relation with visual images on a soundtrack of a film or videotape. If you are making a video and want to incorporate copyrighted music with the action on the video, you must obtain a synchronization license from the copyright owner. This requires an entirely different agreement from those with BMI and ASCAP.

However, you also need a performance license when you play or show your video; that is in addition to the sync license. The BMI and ASCAP licenses are the performance licenses. Therefore, you will end up paying twice, for two different rights owned by the copyright owner(s): once for the sync rights, which give you the right to synchronize the music into your video, and once again for the performance of what you synced in, unless you covered the performance in your sync license agreement with the composer.

19. How long have BMI and ASCAP been around? What is the possibility of a third or fourth entity coming along and asking for money?

ASCAP was formed in 1914; BMI was formed in 1939. Another much smaller American music licensing group called SESAC—the Society of European Stage Authors and Composers—has a small repertory of music copyrighted in the United States. Many such licensing organizations exist in other countries around the world.

The only two groups that have expressed interest in the meetings industry have been BMI and ASCAP, which license 90-95 percent of the music currently in use. Both BMI and ASCAP have reciprocal arrangements with other licensing groups around the world, which permit BMI and ASCAP licensees to have access to these international repertories and pay royalties to BMI and ASCAP. Those organizations are then responsible for making the appropriate royalty payments to the international organizations.

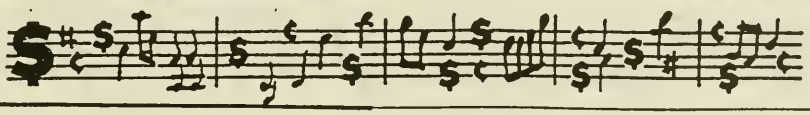
If you have a "weird piece of music" that you are not sure is contained in either BMI or ASCAP's repertory, you can ask either organization if it is part of its repertory. However, since composers jump around from one licensing group to another, you cannot assume that because one song by an artist is in BMI's repertory, all are. The artist may have licensed some of his or her works with BMI and others with ASCAP. Some composers license neither society so you'd work directly with the composer or his or her agent.

Remember, too, these licenses are only for what are called "nondramatic" performances of the licensed works. If you want to put on a performance of all or a large part of a musical production, you must get that license from the author or composer, since such dramatic performances are not licensed by BMI or ASCAP.

20. Does this licensing apply to meetings outside the United States?

No, that's a whole new can of worms. Once you get outside the United States, you are dealing with different performing rights societies that have their own music

(Continued on page 7)



Know Your Alternatives

Three Options That Don't Involve BMI or ASCAP

If an association does not sign a licensing agreement with BMI (Broadcast Music Incorporated) or ASCAP (the American Society of Authors, Composers, and Publishers), it has three options for playing music at its meeting: Negotiate its own agreement with the composer of the music, play music from a music "library," or use music that is in the public domain.

Negotiating your own agreement. If you choose not to sign an agreement with BMI or ASCAP, you may directly contact the copyright owner (i.e., the composer) to negotiate an agreement that would give you the right to perform the music. *The International Who's Who in Music and Musicians Directory* lists the composers, authors, and publishers of music, along with how they may be reached. The directory may be found at a local library and at The Library of Congress, Washington, D.C., or by contacting the directory's publishers: IWWM, International Biographical Center, Cambridge, England CB23QP.

Using music in the public domain. Published music for which the copyright has expired is in the public domain. There is no fee for music in the public domain performed live. Pre-recorded public domain music (e.g., a symphony orchestra's recording of Beethoven's Fifth Symphony) has been re-copyrighted, and you must pay a fee for using it. To find out if a particular song is in the public domain, you may visit the Library of Congress to research the song or write to the Library of Congress, Copyright Office, Attn: Reference Center, Washington, DC 20559. Requests must be in writing, and there is a $10 an hour fee for any research conducted.

Choosing music from libraries. Music libraries that produce and house thousands of traditional and contemporary tunes, offer associations another recorded-music option.

How do music libraries work? A company that has a music library hires its own composers, producers, singers, musicians, and technical staff to produce the songs—everything from symphonic to jazz to rock and pop. The music is often used in commercials, advertisements, and even meetings.

Mitchel Greenspan, vice president of DeWolfe Music Library, New York City, says, "When a client calls, we try to get an idea of the mood or feeling they are trying to create. Based on that information, we'll send them an album, compact disc, or something that can be transferred to an audiotape of music that will hopefully satisfy that mood or feeling."

If an association likes a song or songs, it can sign a blanket license that gives it the right to use the music for a specific period of time. Each library retains the copyright on its music.

Among the companies that have music libraries are

- Associated Production Music, 6255 Sunset Blvd., Suite 820, Hollywood, CA 90028; (213) 461-3211.
- Capital Music, 1750 North Vine, Hollywood, CA 90026; (213) 462-6251.
- DeWolfe Music Library, 25 West 45th St., New York, NY 10036; (212) 382-0220.
- FirstCom, 13747 Montfort Dr., Suite 220, Dallas, TX 75240; (214) 934-2222.
- Killer Tracks, 6528 Sunset Blvd., Hollywood, CA 90028; (213) 957-4455.
- Manhattan Production Music, 311 W. 43rd St., Suite 702, New York, NY 10036; (800) 227-1954.
- Omnimusic, 52 Main St., Port Washington, NY 11050; (516) 883-0121.
- Promusic Inc., 6555 N.W. 9th Ave., Suite 303, Fort Lauderdale, FL 33309; (305) 776-2070.
- TRF Production Music Libraries, 1619 Broadway, New York, NY 10019; (212) 265-8090.

...Q & A on Music Licensing

(Continued from page 6)

licenses. Some reciprocal organizations are allowing music licensed outside the United States to be played in the United States, but it doesn't work in reverse. If you plan to play copyrighted music at an international meeting, ask the hotel or convention facility for the name of the performing rights society that licenses music in that country.

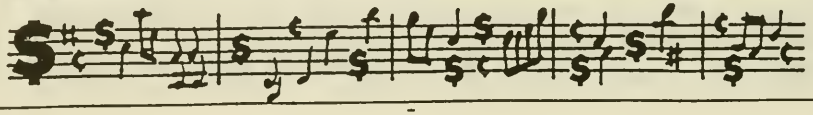
Because so many associations are holding international meetings, this may be the next effort someone suggests we tackle.

21. If your conference is a cooperative effort of several associations, who signs the contract?

In some instances, each of the cooperating organizations will already have licenses, and only one licensing fee should be required for the multiassociation event. If not, the multigroup entity could get its own license.

To obtain a copy of the BMI agreement, call BMI at (800) 669-4264; To obtain a copy of the ASCAP agreement, call ASCAP at (800) 627-9805.

Special thanks to Henry Schaffer, an attorney at Howe & Hutton, Ltd., Chicago, who wrote many of the answers to the above questions, which were posed during a seminar entitled "Music Licensing: Your Rights and Responsibilities," held during ASAE's Annual Meeting & Exposition last summer.



Pay to Play

...Model Agreements Facilitate Music Copyright Compliance

(Continued from page 1)

specific function where live music is being played (see "Fee Schedules," page 4).

"The Music Licensing Task Force worked effectively," says Taylor. "We were glad we were able to help produce what turned out to be a better agreement that is more representative of the meetings industry."

"I am very proud of the work done by the task force," adds Edward H. Able, Jr., CAE, chairman of the task force and executive director of the American Association of Museums, Washington, D.C. According to Able, the result is an agreement that "is fair and beneficial to all parties."

The task force recommendations that are now part of the BMI and ASCAP form agreements follow:

- Specific terms—such as *exposition, convention,* and *meeting*—are clearly defined to better explain which types of events and functions are covered.
- Each agreement allows the licensee to perform, present, or cause the nondramatic performance of all musical works in BMI's or ASCAP's repertory.
- Separate fees are required for recorded and live music. Fees for recorded music (whether the music is played in the exhibit hall, a seminar, or both) are based on the number of people registered for the conference plus half the exhibit personnel. An association only pays one fee per conference for recorded music, whether recorded music is played at 1 or 10 functions.

Fees for live music played in an exhibit hall are based on the number of people registered for the conference plus half the exhibit personnel; fees for live music played outside the exhibit hall (e.g., at a dinner dance) are based on the number of people registered to attend each particular function. In other words, fees for live music are charged for each particular function at which the music is used (see "How to Calculate the Fees," page 5).

BMI's music licensing agreement runs from Oct. 1, 1990, to Dec. 31, 1993; ASCAP's music licensing agreement runs from Jan. 1, 1991, to Dec. 31, 1994. Once an association signs an agreement with BMI and/or ASCAP, it is the association's responsibility to inform BMI and/or ASCAP when its meeting(s) will be held.

Under BMI's agreement, associations will be charged 4 cents per person per event for recorded music (phonographs, tapes, broadcasts, and so forth) through the remainder of 1990. BMI's live music fees for 1990 range from $20 per day for music played to groups of 150 or fewer to $500 per day for music played for 10,000 or more people. For 1990, BMI's maximum per-event fee is $4,000. BMI's fees for recorded and live music increase in 1991, 1992, and 1993.

Under ASCAP's agreement, associations will be charged 4.5 cents per person per event for recorded music in both 1991 and 1992. ASCAP's live music fees for the same time period range from $25 per day for music played to groups of 250 or fewer to $500 per day for music played for more than 10,000 people. For 1990, ASCAP's maximum per-event fee is $4,000.

ASCAP fees for both recorded and live music increase in 1993 and each calendar year thereafter. The contract states that "the license fees shall be the license fees for 1992, adjusted in accordance with any increase in the national Consumer Price Index between October 1989 and the October preceding the calendar year in question." Adjustments to license fees would then be rounded as follows: to the nearest 1/2 cent for mechanical (recorded) music, to the nearest $5 for live music, to the nearest $10 for the minimum fee payable, and to the nearest $50 for the maximum fee payable.

Neither organization requires an association to document the specific songs played during its meeting. Because most copyrighted music is licensed either by BMI or ASCAP (neither organization licenses the same song), Henry Schaffer, an attorney at Howe & Hutton, Ltd., Chicago, suggests an association sign an agreement with both organizations to ensure that it has the right to use the music being played at its meetings. If an association chooses to sign both agreements, it is required to pay fees to both BMI and ASCAP. If an association chooses not to sign an agreement with both organizations, it risks violating the United States Copyright Law.

Both agreements license copyrighted music for meetings held in the United States and its territories; for meetings held outside the United States, associations should contact the hotels or convention centers where their meeting is being held to find out the performing society in that country that licenses music.

According to Jonathan T. Howe, the task force's representative and a senior partner in Howe & Hutton, Ltd., Chicago, both BMI and ASCAP plan to conduct educational seminars for meeting planners (see also "Getting Informed," page 5). For information, call ASAE at (202) 626-2798.

Task force members in addition to ASAE include the Convention Liaison Council, Washington, D.C.; Professional Convention Management Association, Birmingham, Alabama; Meeting Planners International, Dallas; and the Religious Conference Management Association, Indianapolis.

Contracts to be Mailed

Both BMI (Broadcast Music Incorporated) and ASCAP (the American Society of Composers, Authors, and Publishers) are sending copies of their music licensing agreements to all ASAE members this month.

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EXHIBIT 4

302/237

GLA-84

AGREEMENT, made at New York, N.Y. on MAR 22 1985, 19..... between BROADCAST MUSIC, INC., a corporation organized under the laws of the State of New York (hereinafter called BMI) with principal offices at 320 West 57th Street, New York, N.Y. 10019, and

Publick House Inc
(Legal Name of Ownership)

CHECK APPROPRIATE BOX AND COMPLETE

☒ A corporation organized under the laws of the State of New Jersey

☐ A partnership composed of .....

☐ An individual residing at .....

(hereinafter called LICENSEE) with offices located at 111 Main Street
(Street address)

City Chester, State N. J. Zip 07930

Telephone No. (Area Code) (201) 879-6878

1. BMI hereby grants to LICENSEE a non-exclusive license to perform publicly at the premises known as Publick House

located at 111 Main Street
(Street address)

in the City of Chester in the State of N. J. Zip 07930

all of the musical works the right to grant public performance licenses of which BMI shall during the term hereof control. Said license shall not include dramatic rights, the right to perform dramatico-musical works in whole or in substantial part, the right to present individual works in a dramatic setting or the right to use the music licensed hereunder in any other context which may constitute an exercise of the "grand rights" therein. Said license also shall not include the right to broadcast, telecast, or otherwise transmit the performances licensed hereunder to persons outside of the licensed premises.

2. As used in this agreement:

(a) "Term" shall mean the period beginning Nov. 1, 1984 and ending Oct. 31, 1985 and continuing thereafter for additional periods of one (1) year each, unless cancelled by either party at the end of said period or any subsequent period, upon thirty (30) days advance written notice by regular first-class U.S. mail to the other party. Each one (1) year period during the term is referred to herein as a "contract year".

(b) "Live music" shall mean music performed by musicians, singers and other entertainers actually present and performing at LICENSEE's premises.

(c) "Live music and entertainment costs" shall mean all expenditures of every kind and nature (whether in money or any other form of consideration) made by LICENSEE, or on LICENSEE's behalf, for live music. The services of LICENSEE and/or non-compensated musicians or entertainers shall be included in "entertainment costs" at the prevailing rate for such services in the community. Also included in "entertainment costs" are expenditures for room and board where LICENSEE is obligated to provide accommodations to musicians and entertainers as part of the consideration for such entertainment services.

(d) "Recorded music" shall mean the performance of music by means of a mechanical or electronic device or via the reception of broadcast audio transmissions on receiving apparatus and amplification thereof for public performance. Such performances may be reproduced only by loudspeakers located on the licensed premises.

(e) "Dancing is permitted" shall mean that the owner or operator of the licensed premises allows dancing on a regular basis anywhere on said premises.

3. LICENSEE agrees to pay to BMI for each contract year of the term hereof a license fee determined in the following manner:

(a) LIVE MUSIC ONLY: LICENSEE shall pay the applicable amount directly opposite LICENSEE's bracket of live music and entertainment costs indicated on Schedule A herein. FILL IN AMOUNT IN PARAGRAPH 4(a).

(b) RECORDED MUSIC ONLY: LICENSEE shall pay the applicable amount indicated on Schedule B herein under the heading "WITHOUT LIVE MUSIC". FILL IN AMOUNT IN PARAGRAPH 4(b).

(c) LIVE MUSIC AND RECORDED MUSIC: LICENSEE shall pay both (i) the applicable amount indicated on Schedule A herein and (ii) the applicable amount indicated on Schedule B herein under the heading "WITH LIVE MUSIC". FILL IN AMOUNTS IN PARAGRAPHS 4(a) AND 4(b) AND THE TOTAL IN PARAGRAPH 4(c).

PLEASE COMPLETE WHITE AREAS ONLY

4. For the first contract year of this agreement, it is agreed that the license fee shall be LICENSEE's estimate of the sum of (i) the applicable license fee for the use of live music and entertainment in accordance with Schedule A, and (ii) the applicable license fee for the use of recorded music in accordance with Schedule B.

(a) LICENSEE's estimate of its anticipated live music and entertainment costs for the first contract year is $ 14500.00 and the estimated annual license fee for the use of live music and entertainment as determined from Schedule A is ..... $ 225.00

(b) If LICENSEE uses recorded music, LICENSEE warrants and represents that the room capacity of the licensed premises is 60 and falls within Class 1A of Schedule B and the annual license fee as determined from Schedule B is ..... $ 60.00

(c) If LICENSEE uses both live and recorded music, Subparagraphs 4(a) and 4(b) above should both be completed. The total of the amounts indicated therein shall be LICENSEE's estimated license fee, which is .... $ 285.00

(d) The estimated fee for each contract year subsequent to the first contract year of the term hereof shall be the actual fee reported by LICENSEE for the previous contract year, pursuant to Paragraph 6 hereof.

5. The license fee calculated pursuant to Paragraph 4 hereof is due and payable in full upon the signing of this agreement. The license fee for each subsequent contract year shall be due and payable within twenty (20) days of each anniversary date during the term of this agreement. At the option of LICENSEE, payment of the estimated fee may be made in quarterly installments, provided that said quarterly installments are made no later than twenty (20) days after the start of each quarterly period. If any quarterly payment is not timely received, the option herein granted to LICENSEE to make quarterly payments shall terminate, and the balance of the then-current year's estimate will immediately become due and payable. All subsequent estimates will then become due and payable annually within twenty (20) days of each anniversary date.

6. Within thirty (30) days after the expiration of each contract year, LICENSEE shall furnish BMI (on forms to be supplied by BMI) with a statement, certified either by an officer, owner, or by the auditor of LICENSEE, which shall include the following information for such contract year: (a) if live music was performed, the total live music and entertainment costs for such contract year and (b) if recorded music was performed, the room capacity of the licensed premises and whether or not dancing was permitted.

(a) If the actual fee due BMI is less than the estimated fee already paid to BMI for such contract year, BMI agrees to credit the difference to the account of LICENSEE and, if such difference shall occur during the last year of the term hereof, BMI agrees to return same promptly.

(b) If the actual fee due BMI is greater than the estimated fee already paid by LICENSEE to BMI for such contract year, LICENSEE shall pay BMI the difference between the actual and estimated license fee within thirty (30) days of LICENSEE's receipt of the adjusted statement of license fees sent by BMI.

(c) In the event that LICENSEE's Class of recorded music use changes more than once in any contract year, there shall be only one adjustment in LICENSEE's recorded music fee made for such year and it shall be in an amount equal to the fee for a premises of that Class in which LICENSEE operated for the greatest part of the year in which said change(s) occurred.

SCHEDULE A
LIVE MUSIC AND ENTERTAINMENT

SELECT THE APPLICABLE AVERAGE WEEKLY EXPENSE (*AWE*)
TO DETERMINE BRACKET OF ANNUAL ENTERTAINMENT COSTS
AND ENTER ANNUAL LICENSEE FEE IN PARAGRAPH 4(a) ABOVE

BRACKET OF ANNUAL ENTERTAINMENT COSTS	ANNUAL LICENSE FEE	BRACKET OF ANNUAL ENTERTAINMENT COSTS	ANNUAL LICENSE FEE	BRACKET OF ANNUAL ENTERTAINMENT COSTS	ANNUAL LICENSE FEE
Less than $5,000.00 *(AWE less than $96)*	$120	$25,000.00 to $34,999.99 *(AWE $481 — $673)*	$365	$100,000.00 to $119,999.99 *(AWE $1,924 — $2,307)*	$750
$5,000.00 to $7,999.99 *(AWE $97 — $153)*	$150	$35,000.00 to $49,999.99 *(AWE $674 — $961)*	$415	$120,000.00 to $139,999.99 *(AWE $2,308 — $2,692)*	$875
$8,000.00 to $9,999.99 *(AWE $154 — $192)*	$180	$50,000.00 to $64,999.99 *(AWE $962 — $1,249)*	$475	$140,000.00 to $159,999.99 *(AWE $2,693 — $3,076)*	$1,050
$10,000.00 to $14,999.99 *(AWE $193 — $288)*	$225	$65,000.00 to $79,999.99 *(AWE $1,250 — $1,538)*	$525	$160,000.00 & over *(AWE $3,077 or more)*	$1,050 + ¾ of 1% (.005) of each dollar of expense thereafter
$15,000.00 to $24,999.99 *(AWE $289 — $480)*	$300	$80,000.00 to $99,999.99 *(AWE $1,539 — $1,923)*	$625		

PLEASE COMPLETE WHITE AREAS ONLY

SCHEDULE B
RECORDED MUSIC

	WITH LIVE MUSIC				WITHOUT LIVE MUSIC			
ROOM CAPACITY OF PREMISES (AS DETERMINED BY LOCAL FIRE AUTHORITY)	CLASS	NO DANCING IS PERMITTED AT ANY TIME TO RECORDED MUSIC	CLASS	DANCING IS PERMITTED TO RECORDED MUSIC	CLASS	NO DANCING IS PERMITTED AT ANY TIME TO RECORDED MUSIC	CLASS	DANCING IS PERMITTED TO RECORDED MUSIC
1 — 75	1A	$ 80	1B	$ 105	1C	$ 110	1D	$ 180
76 — 150	2A	$ 90	2B	$ 145	2C	$ 135	2D	$ 260
151 — 225	3A	$ 120	3B	$ 185	3C	$ 170	3D	$ 340
226 — 300	4A	$ 150	4B	$ 225	4C	$ 205	4D	$ 420
301 — 375	5A	$ 175	5B	$ 265	5C	$ 245	5D	$ 500
376 — 450	6A	$ 210	6B	$ 295	6C	$ 275	6D	$ 580
451 — 525	7A	$ 240	7B	$ 350	7C	$ 310	7D	$ 660
526 — 600	8A	$ 270	8B	$ 375	8C	$ 345	8D	$ 740
601 — 675	9A	$ 300	9B	$ 425	9C	$ 380	9D	$ 820
676 — 750	10A	$ 330	10B	$ 460	10C	$ 415	10D	$ 900
751 & over	11A	$ 360	11B	$ 510	11C	$ 450	11D	$ 980

7. BMI shall have the right to require such reasonable data or information relating to LICENSEE's annual expenditures for live music and entertainment and the recorded music policy at the premises, in addition to that furnished pursuant to Paragraph 6 hereof, as may be necessary in order to ascertain the annual license fee. BMI shall have the right, by its authorized representatives, at any time during customary business hours, to examine the books and records of account of LICENSEE to such extent as may be necessary to verify the statements made hereunder. BMI shall consider all data and information coming to its attention as a result of any such examination of books and records as confidential.

8. In the event that BMI is made aware of a change of Class or bracket of entertainment costs of the licensed premises and LICENSEE has failed to notify BMI of such change through the submission of the next statement required by Paragraph 6 hereof, BMI shall have the right to notify LICENSEE in writing by certified mail of its knowledge of such change and if LICENSEE does not contest such notice in writing by certified mail within thirty (30) days of the receipt thereof, such change shall be deemed accurate and an adjustment shall be made in accordance with Subparagraph 8 (a), (b) or (c) hereof.

9. In the event that LICENSEE discontinues the use of all live and recorded music at the premises during the term of this agreement and so notifies BMI in writing by certified mail, within sixty (60) days after receipt of such notice an adjustment shall be made by BMI for that partial calendar year, provided that, in the case of live music, LICENSEE has submitted a statement of entertainment costs incurred up to the date of discontinuance. In no event, however, shall any such adjusted live music license fee be less than the lowest license fee on Schedule A or any such adjusted recorded music license fee, which shall be a proration of the full year's license fee, be less than the applicable Class 1 license fee on Schedule B. LICENSEE shall not be obligated to make future payments to BMI thereafter for the discontinued music (provided the balance of any previously due license fee has been paid) until such time as LICENSEE shall resume the use of such music at the premises, and LICENSEE agrees to send written notice of any resumption to BMI within thirty (30) days thereof. If LICENSEE discontinues the use of either live or recorded music, but not both, the provisions of this agreement shall continue to be applicable to that music which continues to be used at the premises. The term "discontinuance" as used herein shall mean the total abandonment, rather than a seasonal or periodic cessation, of the use of music and entertainment.

10. If, during the term hereof, LICENSEE shall cease to operate the premises, whether by reason of sale or lease thereof, or otherwise, this agreement and the obligation of LICENSEE to BMI shall thereupon terminate, provided, however, that LICENSEE shall, within ten (10) days thereafter, give written notice of such termination to BMI, setting forth the effective date thereof and the name of the new owner or operator of the premises, as the case may be, and that LICENSEE shall pay to BMI all fees due hereunder until said effective date.

11. In the event that BMI, at any time during the term hereof, shall, for the individual licensing of establishments of the same class and category as that of LICENSEE, issue licenses granting rights similar to those in the agreement on a more favorable basis, BMI shall, for the balance of the term hereof, offer LICENSEE a comparable agreement.

12. BMI agrees to indemnify, save harmless and defend LICENSEE, its officers and employees, from and against any and all claims, demands or suits that may be made or brought against them or any of them with respect to the performance of any material licensed under this agreement. Such indemnity shall be limited to works which are licensed by BMI at the time of LICENSEE's performances. BMI's Clearance Department will, upon request, advise LICENSEE whether particular musical works are available for performance as part of BMI's repertoire. LICENSEE agrees to give BMI immediate notice of any such claim, demand or suit, to deliver to BMI any papers pertaining thereto and to cooperate with BMI with respect thereto, and BMI shall have full charge of the defense of any such claim, demand or suit.

13. BMI reserves the right at its discretion to withdraw from the license granted hereunder any musical work as to which any legal action has been instituted or a claim made that BMI does not have the right to license the performing rights in such work or that such work infringes a composition not in the BMI repertoire.

14. All disputes of any kind, nature or description arising in connection with the terms and conditions of this agreement shall be submitted to the American Arbitration Association in New York, New York for arbitration under its then prevailing rules, the arbitrator(s) to be selected as follows. Each of the parties hereto shall, by written notice to the other, have the right to appoint one arbitrator. If, within ten (10) days following the giving of such notice by one party, the other shall not, by written notice, appoint another arbitrator, the first arbitrator shall be the sole arbitrator. If two arbitrators are so appointed, they shall appoint a third arbitrator. If ten (10) days elapse after the appointment of the second arbitrator and the two arbitrators are unable to agree upon the third arbitrator, then either party may, in writing, request the American Arbitration Association to appoint the third arbitrator. The award made in the arbitration shall be binding and conclusive on the parties and judgment may be, but need not be, entered in any court having jurisdiction. Such award shall include the fixing of the costs, expenses and attorney's fees of arbitration, which shall be borne by the unsuccessful party.

15. Upon any breach or default of the terms and conditions contained herein, BMI shall have the right to cancel this agreement if such breach or default continues thirty (30) days after LICENSEE's receipt of written notice thereof. The right to cancel granted to BMI shall be in addition to any and all other remedies which BMI may have. No waiver by BMI of full performance of this agreement by LICENSEE in any one or more instances shall be deemed a waiver of the right to require full and complete performance of this agreement thereafter or of the right to cancel this agreement in accordance with the terms of this Paragraph.

16. This agreement constitutes the entire understanding between the parties and cannot be waived or added to or modified orally, and no waiver, addition or modification shall be valid unless in writing and signed by the parties. The rights of LICENSEE shall not be assignable. This agreement, its validity, construction and effect, shall be governed by the laws of the State of New York. The fact that any provisions herein are found by a court of competent jurisdiction to be void or unenforceable shall not affect the validity or enforceability of any other provisions.

IN WITNESS WHEREOF, this agreement has been executed by the duly authorized representatives of BMI and LICENSEE all as of the date first above written.

BROADCAST MUSIC, INC.

By .....
(Signature)

HERMAN BRANDON
ADMINISTRATIVE DIRECTOR/LICENSING
(Print Name of Signer)

(Title of Signer)

THE ARENA HOUSE INC.
LICENSEE (Legal Name of Ownership)

By .....
(Signature)

GUY W. GREGG
(Print Name of Signer)

PRESIDENT
(Title of Signer)

PLEASE COMPLETE WHITE AREAS ONLY

MUSIC PERFORMANCE AGREEMENT

Restaurants, Nightclubs, Bars, Cocktail Lounges, Taverns, Disco's, and other Establishments

3621237

AGREEMENT, made at New York, N.Y. on (Date Will Be Entered By BMI Upon Execution) MAR 13 1991 between BROADCAST MUSIC INC. (hereinafter BMI), a State of New York corporation with its principal offices at 320 West 57th Street, New York, N.Y. 10019 and the entity described below and referred to thereafter as LICENSEE

ENTER LEGAL NAME ▶ The Publick House, Inc
(Name of Corporation, Partnership or Individual Owner)

ENTER TRADE NAME ▶ _____
(Doing business under the name of)

CHECK APPROPRIATE BOX AND COMPLETE ▶ ☑ Corporation (State of Incorporation) N.J. ☐ Partnership (Enter names of partners) _____ ☐ Individual Owner (Indicate residence address below under Mailing Address.)

PREMISE ADDRESS	MAILING ADDRESS
111 Main Street (Street Address)	P.O. Box 729 (Street Address)
Chester, New Jersey, 07930 (City, State, Zip)	Chester, NJ. 07930 (City, State, Zip)
(908) 879-6808 Linda Gregg (Telephone No.) (Contact Name)	(908) 879-6858 Linda Gregg (Telephone No.) (Contact Name)
Title: Owner	Title: Owner

1. DEFINITIONS:

(a) **Live music:** music performed by musicians, singers or other entertainers actually present and performing at the licensed premises.

(b) **Live music and entertainment costs:** expenditures of every kind (whether money or any other consideration) made by or for LICENSEE for live music. The services of LICENSEE and/or non-compensated musicians or entertainers shall be included in "entertainment costs" at the prevailing rate for such services in the community. Also included in "entertainment costs" are expenditures for room and board where LICENSEE is obligated to provide them as part of the consideration for such entertainment services.

(c) **Recorded music:** the performance of music by mechanical or electronic devices for background, foreground or as part of audio visual presentations, etc., which include, but are not limited to, records, tapes, CD's, broadcasts, satellite signals and/or cablecasts.

(d) **Dancing:** patrons, performers or employees dancing to recorded music anywhere on the licensed premises.

(e) **Discontinuance:** to permanently stop the use of all music, both live and recorded.

2. BMI GRANT

(a) BMI hereby grants to LICENSEE a non-exclusive license to perform publicly at the licensed premises all of the musical works the rights to grant public performance licenses of which BMI controls during the term. This license does not include: (i) dramatic rights: the right to perform dramatico-musical works in whole or in substantial part, the right to present individual works in a dramatic setting or the right to use the music licensed hereunder in any other context which may constitute an exercise of the "grand rights" therein or (ii) the right to broadcast, telecast, cablecast, or otherwise transmit the performances licensed hereunder to persons outside of the premises, or (iii) performances of music by means of a coin-operated phonorecord player (jukebox) as defined in the Copyright Law (17 U.S.C. §116).

(b) BMI reserves the right at its discretion to withdraw from the license granted hereunder any musical work as to which any legal action has been instituted or a claim made that BMI does not have the right to license the performing rights in such work or that such work infringes another composition.

3. TERM OF AGREEMENT

The initial term of this annual agreement shall begin on the first day ~~JAN 1991~~ NOV 1 1990 and end on the last day of ~~DEC 1991~~ OCT 31 91 and continue for additional periods of one (1) year each, unless cancelled by either party at the end of any period upon 30 days advance written notice. Each one (1) year period is a "contract year."

4. FEES

(a) LICENSEE agrees to pay to BMI for each contract year an **estimated** fee as an advance of the **actual** fee. The **estimated** fee shall then be adjusted in accordance with Paragraph 5. The first estimated annual fee due shall be payable upon the signing of the agreement by LICENSEE. The resulting **actual** fee shall be determined as follows:

(i) **LIVE MUSIC AND ENTERTAINMENT ONLY**—LICENSEE shall pay the applicable fee as indicated. See page 4, License Fee Schedule, Category 1.

(ii) **RECORDED AND LIVE MUSIC**—LICENSEE shall pay the applicable fee as indicated. See page 4, License Fee Schedule, Category 1 and Category 2.

(iii) **RECORDED MUSIC ONLY**—LICENSEE shall pay the applicable fee as indicated. See page 4, License Fee Schedule, Category 1.

(b) For each subsequent contract year the estimated license fee is due and payable no later than 20 days after each anniversary date of this agreement. Beginning with the second contract year and at the option of LICENSEE upon written request, payment of the estimated fee may be made in quarterly installments, provided that they are made no later than twenty (20) days after the start of each quarterly period. If any quarterly payment is not received on time, this option terminates, and the balance of the then current year's estimate will immediately become due and payable. All subsequent estimates will then be due and payable annually. The estimated fee for each contract year after the first contract year is the actual annual fee payable by LICENSEE for the previous contract year, pursuant to this paragraph.

5. REPORTING

(a) After the first contract year, at the same time that the estimated annual fee is paid, LICENSEE will furnish BMI, on BMI forms, a report certified either by an officer, owner, operator or by the auditor of LICENSEE, including the following information for the prior contract year: if live music was performed, the total live music and entertainment costs; if recorded music was performed, the maximum room occupancy of the licensed premises, whether or not there is dancing at the premises, and whether or not licensee audio-visual performances of recorded music were given. These reports will continue to be made during any period of discontinuance.

(b) If after processing the annual report, the actual fee due BMI is less than the estimated fee already paid for such contract year, BMI will credit the difference to the account of LICENSEE and, if such difference occurs during the last year of the term, BMI will return same promptly.

(c) If after processing the annual report, the actual fee due BMI is greater than the estimated fee already paid for such contract year, LICENSEE will pay the difference between the actual and estimated license fee within thirty (30) days of receipt of BMI's adjusted statement.

6. DISCONTINUANCE OF MUSIC

In the event that LICENSEE discontinues the use of all music, or if LICENSEE ceases to operate the premises during the term and so notifies BMI in writing within thirty (30) days after receipt of such notice, a pro rata adjustment of the recorded music fee payable by BMI for that contract year, provided that LICENSEE submits a report as required by Paragraph 5 for all music used up to the date of discontinuance. In no event shall any fee be less than the lowest applicable Category 1, Category 2 and Category 3 fee of that contract year. LICENSEE will not be obligated to make future payments to BMI for the discontinued music (provided all previously due license fees have been paid) unless LICENSEE resumes the use of music. If LICENSEE discontinues the use of either live or recorded music, but not both, this agreement shall continue to be applicable to the music which continues to be used. LICENSEE will send written notice of any resumption of music to BMI within thirty (30) days thereof and at the same time provide BMI with the information required in Paragraph 5. If discontinuance and resumption occur in the same contract year, license fees shall be payable as if discontinuance never occurred and LICENSEE's estimated fee immediately prior to discontinuance shall be reinstated.

7. REVIEW OF STATEMENTS AND/OR ACCOUNTINGS

BMI will have the right, by its authorized representatives, at any time during customary business hours and upon thirty (30) days advance written notice, to examine those portions of LICENSEE's books and records of account to such extent as may be necessary to verify any and all statements and/or accountings made hereunder or under any prior agreement with BMI. BMI, in its sole discretion, will determine whether an examination shall be made. BMI shall consider all data and information coming to its attention as the result of any such examination of LICENSEE's books and records as confidential.

8. INDEMNITY BY BMI

BMI agrees to indemnify, save harmless and defend LICENSEE, its officers and employees, from and against any and all claims, demands or suits that may be made or brought against them or any of them with respect to the performance of any material licensed under this agreement. This indemnity shall be limited to works which are licensed by BMI at the time of LICENSEE's performances. BMI will, upon reasonable written request, advise LICENSEE whether particular musical works are available for performance as part of BMI's repertoire. LICENSEE shall provide the title and the writer/composer of each musical composition requested to be identified. LICENSEE agrees to give BMI immediate notice of any such claim, demand or suit, to deliver to BMI any papers pertaining thereto, and to cooperate with BMI with respect thereto, and BMI shall have full charge of the defense of any such claim, demand or suit.

9. CANCELLATION OF ENTIRE CATEGORY

BMI shall have the right to cancel this agreement along with the simultaneous cancellation of the agreements of all other licensees of the same class and category as LICENSEE as of the end of any month during the term upon sixty (60) days advance written notice.

10. OFFER OF COMPARABLE AGREEMENT

In the event that BMI, at any time during the term hereof, shall for the same class and category as that of LICENSEE issue licenses granting rights similar to those in this agreement on a more favorable basis, BMI shall, for the balance of the term, offer LICENSEE a comparable agreement.

11. BREACH OR DEFAULT/WAIVER

Upon any breach or default of the terms and conditions of this agreement, BMI has the right to cancel this agreement, but any such cancellation shall only become effective if the breach or default continues thirty (30) days after the date of BMI's written notice to LICENSEE. The right to cancel is in addition to any and all other remedies which BMI may have. No waiver by BMI of full performance of this agreement by LICENSEE in any one or more instances will be a waiver of the right to require full and complete performance of this agreement thereafter or of the right to cancel this agreement in accordance with the terms of this Paragraph.

12. ARBITRATION
All disputes of any kind, nature or description arising in connection with the terms and conditions of this agreement shall be submitted to the American Arbitration Association in the City, County and State of New York, for arbitration under its then prevailing arbitration rules. The arbitrator(s) to be selected as follows: Each of the parties shall, by written notice to the other, have the right to appoint one arbitrator. If, within ten (10) days following the giving of such notice by one party the other shall not, by written notice, appoint another arbitrator the first arbitrator shall be the sole arbitrator. If two arbitrators are so appointed, they shall appoint a third arbitrator. If ten (10) days elapse after the appointment of the second arbitrator and the two arbitrators are unable to agree upon a third arbitrator, then either party may, in writing, request the American Arbitration Association to appoint the third arbitrator. The award made in the arbitration shall be binding and conclusive on the parties and judgment may be, but need not be, entered in any court having jurisdiction. Such award shall include the fixing of the costs, expenses and attorneys' fees of arbitration, which shall be borne by the unsuccessful party.

13. NOTICES
Any notice under this agreement will be in writing and deemed given, upon mailing when sent by ordinary first-class U.S. mail to the party intended, at its mailing address above stated, or any other address which either party may designate. Any such notice sent to BMI shall be to the attention of the General Licensing Department. Any such notice sent to LICENSEE shall be to the attention of the person signing this agreement on behalf of LICENSEE or such other person as LICENSEE may advise BMI in writing.

14. MISCELLANEOUS
This agreement is the entire understanding between the parties, will not be binding until signed by both parties, and cannot be waived or added to or modified orally, and no waiver, addition or modification will be valid unless in writing and signed by the parties. This agreement is executed by the duly authorized representative of BMI and LICENSEE. The rights of LICENSEE are not assignable. This agreement, its validity, construction and effect, will be governed by the laws of the State of New York. The fact that any provisions are found by a court of competent jurisdiction to be void or unenforceable will not affect the validity or enforceability of any other provisions. All headings in this agreement are for the purpose of convenience and shall not be considered to be part of this agreement.

(To Be Completed by BMI)

BROADCAST MUSIC, INC.

(Signature)

JAMES G. ROSATI

(Title of Signer)

(To Be Completed by LICENSEE)

The Public House Inc.
(Name of Corporation, Partnership or Individual Owner
Doing Business as LICENSEE as on page 1)

Sign here ▶ (Signature)

Guy R. Gregg
(Print name of Signer)

President, Owner
(Title in which Signed)

(a) if corporation, state corporate office held; (b) if a partnership, write "Partner"; (c) if individual owner, write "Individual Owner"

MUSIC POLICY STATEMENT

(To estimate fees (for first contract year) complete the questions below.)

LIVE MUSIC

1 Is live music used? yes ✓ no

2 If yes, calculate Weekly Entertainment Costs as indicated below

[Avg. no. of music sets per night] × [Avg. payment per music set] × [No. of nights with live music per week] = 510.00 [Avg. weekly Entertainment Costs]

OR

3 Indicate prior year's Annual Entertainment Costs (if available) .....

4 Using the table below (Category 1) indicate Estimated Annual Live Music Fee (if not applicable, write N/A) ..... $ 440

RECORDED MUSIC

5 Is recorded music used? yes ✓ no

6 Is there dancing, [illegible] yes no ✗

7 Indicate number of rooms and meeting space (in square feet) in which recorded music is played (if any) 44

8 Using the table below (Category 2 or 3) indicate Estimated Annual Recorded Music Fee ..... $

9 If recorded music performances include audio visual use (projection TV monitors video cassettes, etc.) an additional 35% of the Estimated Annual Recorded Music Fee is ..... $ 0

10 Using the table below (Category 2 or 3) indicate Estimated Annual Recorded Music Fee (if not applicable, write N/A) $ 80

[Add lines 8 and 9]

TOTAL ESTIMATED LIVE AND RECORDED ANNUAL FEE $ 520.00

[Add lines 4 and 10]

LICENSE FEE SCHEDULE

LIVE MUSIC FEE

CATEGORY 1

AVERAGE WEEKLY —OR— ANNUAL ENTERTAINMENT COSTS	ANNUAL LIVE MUSIC FEE		
	1990-1991	1992-1993	1994*
$99 or less (Less than $5,000)	$145	$185	$175
100-149 ($5,000 - 7,999)	180	205	220
150-199 ($8,000 - 9,999)	215	245	260
200-299 ($10,000 - 14,999)	270	305	330
300-499 ($15,000 - 24,999)	360	405	440
500-699 ($25,000 - 34,999)	440	495	535
700-899 ($35,000 - 49,999)	500	565	610
900-1,199 ($50,000 - $64,999)	570	640	690
1,200-1,499 ($65,000 - 79,999)	630	710	765
1,500-1,899 ($80,000 - 99,999)	750	845	910
1,900-2,099 ($100,000 - 119,999)	900	1,015	1,095
2,100-2,699 ($120,000 - 139,999)	1,050	1,180	1,275
2,700-3,099 ($140,000 - 159,999)	1,260	1,420	1,530
3,100 or more ($160,000 or more)	1,260 + the sum of 1% (.006) of each dollar of expense over $160,000	1,420 + the sum of 1% (.007) of each dollar of expense over $160,000	1,530 + the sum of 1% (.008) of each dollar of expense over $160,000

* and subsequent years

RECORDED MUSIC FEE

ROOM OCCUPANCY	CATEGORY 2 — ANNUAL RECORDED MUSIC (Where Live Music Is Used)						CATEGORY 3 — ANNUAL RECORDED MUSIC FEE (Where No Live Music Is Used)					
	1990-1991		1992-1993		1994*		1990-1991		1992-1993		1994*	
	up to [illegible]	[illegible]	up to [illegible]	[illegible]	up to [illegible]	[illegible]	up to [illegible]	[illegible]	up to [illegible]	[illegible]	up to [illegible]	[illegible]
1-75	$80	$140	$95	$170	$105	$190	$155	$ 315	$170	$280	$195	$ 315
76-150	120	140	140	225	160	260	180	440	210	405	235	495
151-225	160	245	185	290	210	325	220	445	265	520	300	595
226-300	200	310	235	360	260	400	270	550	320	650	360	735
301-375	210	340	280	410	320	470	320	650	380	775	430	875
376-450	280	390	320	460	370	520	390	760	430	800	480	1,015
451-525	320	455	375	540	420	620	400	860	480	1,025	540	1,155
526-600	360	490	420	590	475	660	440	970	535	1,150	600	1,310
601-675	400	550	480	660	525	750	500	1,070	590	1,275	665	1,435
676-750	440	600	510	720	580	805	540	1,175	640	1,395	725	1,575
751 & Over	480	650	560	790	630	900	595	1,275	700	1,520	800	1,715

[illegible] the appropriate [illegible] Category 2 or 3 [illegible] [illegible] [illegible]

EXHIBIT 5

BMI

December 9, 1993

Ms. Debra Leach
Executive Director
NLBA
4214 King Street, West
Alexandria, VA 22302

Dear Debra,

Thanks for taking the time to talk to me on Monday. As I said, I welcome any input you have on how BMI can better work with your industry.

I discussed the prospect of a BMI/NLBA group agreement with Michele Reynolds, BMI's Director of Marketing & Industry Relations. As you know, BMI is currently negotiating a group agreement with the New Jersey Restaurant Association. If and when it is completed, it will serve as a foundation for future group agreements with organizations like NLBA. We should be better able to address an NLBA group agreement in the very near future.

After you and I spoke on Monday, I reviewed the letter from BMI that resulted in complaints to your office, and I understand why your members were concerned. In future letters we will make sure to specify that only those establishments that use music need to sign a BMI license.

As you requested, I am enclosing a copy of the BMI Music Performance Agreement for restaurants, nightclubs, bars and similar establishments. I have also enclosed the following informational materials:

- National Association of Broadcasters "Helpfax": This bulletin was published by the NAB to provide businesses that play the radio with some guidelines regarding the "small business" exemption for radio use.

- "Music in the Marketplace": This pamphlet was published by the Council of Better Business Bureaus to give an overview of the entire music licensing issue.

- "Questions Most Asked About Music. . .": This is BMI's own pamphlet, designed to address licensing-related questions among nightclub and restaurant operators.

320 West 57th Street New York, New York 10019 (212) 586-2000 Telex 127823

If you would like additional copies of any of the enclosed, please let me know.

The first paragraph under "Public Performance" in the NAB Helpfax explains to some degree why the radio played over a commercial sound system is considered a public performance of music and is not covered by the radio station's license. I am looking into other avenues of clarifying this subject for your industry.

Again, I welcome any opportunity to develop a stronger and better working relationship with NLBA and its members. Please don't hesitate to call me if you need anything.

Sincerely,

Michael Bath
Manager, Industry Relations

encls.

BMI

December 17, 1993

Ms. Debra Leach
Executive Director
NLBA
4214 King Street, West
Alexandria, VA 22302

Dear Debra,

I met with my director, Michele Reynolds, two days ago to further discuss the prospect of a BMI/NLBA group agreement. As I said in my letter last week, the outcome of our current negotiations with the New Jersey Restaurant Association will have a major impact on future group agreements with your industry.

Regardless of the outcome of the NJRA negotiations, there is some information we will need from you before we can prepare a proposal. I have listed these items below:

- The number of NLBA members that use music in their place of business.
- For those who use music, a breakdown of the sources of music used (i.e., how many have live music, how many use recorded music, how many subscribe to a commercial music service).
- The number of NLBA members that have dancing on there premises.
- A breakdown of the maximum premise occupancy of those which use music.

Based on our conversation, I doubt you have much of this information readily available. Unfortunately, it is necessary for us to know these things to develop some aspects of a group license proposal. A couple of associations with which we have negotiated in the recent past opted to survey their members to obtain this profile data. We worked with these associations to develop an appropriate survey. I would be happy to work with you if you would like to go a similar route.

I will be out of the office until January 5, but I would be happy to discuss this with you then or in Las Vegas the following week.

320 W. 57th Street, New York, NY 10019 (212) 586-2000 Telex 127823

In the meantime, I am enclosing a copy of a letter we will be mailing to some liquor licensees in a few western states early next year. As you can see, we have clarified that the recipient needs to sign a license only if music is used on his or her premises. Hopefully this will eliminate calls to your office. I have also enclosed a copy of the questionnaire mentioned in the letter.

Once again, I thank you for your input and look forward to a BMI/NLBA group agreement in the near future.

Sincerely,

Michael Bath

Michael Bath
Manager, Industry Relations

encls.

APPENDIX 4.—SUPPORTING DOCUMENT INDEX OF DISPUTE BETWEEN THE AMERICAN CHORAL DIRECTORS ASSOCIATION (ACDA) AND THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS (ASCAP) AND BROADCAST MUSIC, INC. (BMI)

Dispute between

The American Choral Directors Association (ACDA) and the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI)

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AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS

Tab 1

L Barry Knittel
Director Of Licensing

(212) 870-7576

November 2, 1989

Ameri. Choral Directors Assn
Gene Brooks
Box 6310
Lawton, OK 73506

RE: CONVENTION, INDUSTRIAL AND TRADE SHOW
LICENSE AGREEMENT

Dear Sir/Madam,

Under the United States Copyright Law, public performances of copyrighted musical works, including performances of music during a convention, industrial show or trade show, require a license from the copyright owners of the musical works performed, or their representative.

Since 1914, we, the American Society of Composers, Authors and Publishers (ASCAP), have licensed the right to perform the copyrighted musical compositions of our members -- the creators and owners of the great bulk of America's favorite music.

We are pleased to offer you an ASCAP license which would authorize you to perform any of the hundreds of thousands of songs in the ASCAP repertory at all of your shows. As the organizer of the show, it is your legal responsibility to obtain these rights. By signing an ASCAP license, you will be licensed for the non-dramatic performances of all the copyrighted musical works in our repertory, including performances at show-sponsored events such as banquets and, by the exhibitors during your show.

If you wish, you may obtain an indivudual license directly from each copyright owner whose works you perform. However, an ASCAP license enables you to perform all works of all ASCAP members, as well as music in the repertories of affiliated foreign performing rights societies. Tens of thousands of music users have considered the alternatives, and chosen ASCAP licenses. By doing so, they know that they will not be violating the Copyright Law, even unintentionally.

To tell you more about ASCAP, we are enclosing a brochure which contains important information about ASCAP and your rights. We are also enclosing ASCAP's License Agreement for Conventions, Industrial Shows and Trade Shows, note that the agreement specifies a daily rate for music use, applicable only for those days on which music is performed along with a supply of report forms.

If you desire our license, please sign both copies of the agreement and return them with completed reports and payment. Upon receipt, an executed copy of the agreement will be returned to you for your records.

If you have any questions, please contact us. We hope your shows will be successful, and that ASCAP music will contribute to that success.

Sincerely,

L. BARRY KNITTEL

LBK/th
Enc.

ascap
American Society of Composers, Authors & Publishers

Tab 2

Deborah L. Meth
MANAGER
EDUCATIONAL AND SYMPHONIC LICENSING

212 870-7582

August 31, 1990

American Choral Directors Assoc.
P.O. Box 6310
Lawton, OK 73506

Attn: Gene Brooks

We understand that you are presenting concerts containing copyrighted musical compositions to the public.

As a general matter, under the United States Copyright Law, copyrighted musical works cannot lawfully be performed publicly without permission of the copyright owner. Public performances given without permission are infringements of copyright. The necessary permission, in the form of a license, may be obtained directly from the copyright owner, or from their representative, such as ASCAP.

Enclosed you will find a reprint of an article recently featured in VOICE, the official publication of CHORUS AMERICA. As illustrated by this article, the administration and board of CHORUS AMERICA feel strongly that their membership comply with the copyright law, so that the rights of composers and publishers are protected.

In that regard, ASCAP is pleased to offer two forms of license agreements to you: 1) A Blanket Concert Agreement which calls for advance payment of license fees for all concerts and recitals; provides 20% discounts when you present 25 or more concerts or recitals in a year or pay in advance for 100 or more concerts or recitals; and required submission of copies of musical programs ONLY if they are otherwise available; and 2) A Per Concert License Agreement which requires advance payment of license fees for those concerts or recitals at which ASCAP music is performed, at per-event rates substantially higher than the Blanket Agreement's rates; does not provide for discounts; and requires submission of programs for ALL concerts and recitals whether otherwise prepared or not.

Copies of both forms of agreement are enclosed, along with concert reporting forms. Please sign both copies of the agreement that best suits your needs and return them to this office, together with completed concert report forms and copies of all programs, as required by the agreement you have chosen, from its commencement date.

We are also enclosing an informative brochure, "The ASCAP License: It Works for You," which contains important information about ASCAP and the United States Copyright Law.

If you are in doubt as to whether any of your concerts or recitals include works in our repertory, if you wish to know if specific works are licensed by ASCAP, or if you have any questions, please feel free to contact this office.

Thank you for your kind cooperation.

Cordially,

DEBORAH L. METH

DLM:sae

Encl.

ascap
American Society of Composers, Authors & Publishers

Robert J. Kautz
DISTRICT MANAGER

July 17, 1991

Tab 3

American Choral Directors Ass'n
P.O. Box 6310
Lawton, OK 73506

ATTN: William Hatcher & Dr. Gene Brooks

Dear Sirs:

We recently contacted you and informed you of the ASCAP license agreement which is now available to sponsors of conventions, expositions, industrial shows, meetings, trade shows and similar events. With that letter we enclosed copies of the new agreement and pointed out that the ASCAP license will authorize you to perform any or all of the copyrighted music in the vast ASCAP repertory at each of your events. As of this date, we have yet to receive a response from you.

In case the original package was not received by you or was misplaced, we are enclosing an additional set of license agreements along with a Questions and Answer brochure. Once you have reviewed this information, please either complete and sign both copies of the license agreement and return them to this office or let us know why you believe you do not need an ASCAP license agreement. Upon receipt of a signed license agreement we will execute the agreement and return a copy to you for your files along with a supply of report forms.

Should you or your attorney have any questions concerning this matter please feel free to contact us. Thank you in advance for your cooperation.

Sincerely yours,

Robert J. Kautz
Dallas District Manager

RJK/vr
Enclosures: License Agreement
Question & Answer

L2LCONV

15851 North Dallas Parkway, Suite 1005, Dallas, TX 75248 Area Code (214) 980-6762 Fax (214) 980-6766

THE AMERICAN CHORAL DIRECTORS ASSOCIATION
NATIONAL HEADQUARTERS/THE CHORAL JOURNAL
Post Office Box 6310 Lawton, Oklahoma 73506
(405) 355-8161

GENE BROOKS
Executive Director

Tab 4

October 9, 1991

Mr. Robert (B. J.) Kautz
Sales Manager
American Society of Composers,
Authors, and Publishers
15851 North Dallas Parkway, Suite 1005
Dallas, TX 75248

Dear Mr. Kautz:

I certainly appreciate your visit to the national office of the American Choral Directors Association and your taking some of your valuable time to tell me more about the background of the American Society of Composers, Authors, and Publishers and the many services it offers to musicians of the United States of America. I also appreciate your taking so much time with me here in the national office and letting me tell you about the American Choral Directors Association and the services we provide to the choral directors who are members of the American Choral Directors Association. I believe our discussion assisted both of us in understanding more fully the relationship of the American Choral Directors Association and the American Society of Composers, Authors, and Publishers and hopefully will enhance the ability of the organizations to work very closely together in years to come.

The American Choral Directors Association, founded in 1959, is a non-profit professional organization whose active membership is composed of choral musicians from schools, colleges and universities, communities, industrial organizations, churches, and professional groups. The American Choral Directors Association is one of the largest professional organizations for choral directors in the world with a membership of more than 15,000 conductors representing approximately one million singers. The goal of the American Choral Directors Association is to encourage the finest in choral music and to promote its development in all ways, including performance, composition, publication, and research.

The American Choral Directors Association is organized in the United States into seven geographical divisions, each with its own activities. In addition, each of the fifty states has its own officers, thereby making it possible for members to be in close proximity to persons actively involved in choral music and the American Choral Directors Association. The American Choral Directors Association has numerous national committees engaged in exploring materials, techniques, and standards. Among these are committees representing children's

choirs, junior and senior high school choirs, and college and university choirs; choral music in the community and in the church; vocal jazz groups; ethnic music; male and female chorus; and activities for students.

The American Choral Directors Association sponsors workshops and conventions on the state level as well as division and national conventions where ideas are shared and explored, problems are discussed, and music is heard. Industry representatives frequently exhibit material at these conventions; therefore, members have the opportunity to examine first-hand the latest publications and music-related supplies.

The American Choral Directors Association publications include the *Choral Journal*, published ten months per year, which contains important articles; reviews of books, records, and music; and general information about choral music and musicians throughout the world. The American Choral Directors Association has student chapters in many high schools, colleges, and universities whose members are contributing fresh ideas to the thrust of the national organization.

The American Choral Directors Association continues to encourage its members to comply with the copyright laws of the United States of America. The following statement is printed at the bottom of every American Choral Directors Association membership application form: "As an ACDA member, I will comply with the copyright laws of the United States of America. (Compliance with these laws is also a condition of participation by clinicians and performing ensembles that appear on any ACDA-sponsored event or convention.)" Also included on Page 2 of each issue of the *Choral Journal* is the following statement: "ACDA membership, recogizing its position of leadership, complies with the copyright laws of the United States of America. Compliance with these laws is a condition of participation by clinicians and performing groups in ACDA meetings and conventions." The *Choral Journal* is mailed to more than 15,000 members of the American Choral Directors Association each month, August through May. I believe these two statements will further show the importance of the copyright laws of this country and the desire of the American Choral Directors Association to protect the copyright laws and encourage its membership to obey the copyright laws of this country.

The membership of the American Choral Directors Association purchases music each year to be performed by choirs which they conduct. The music is used as a teaching tool in their classes, training their students in technique, style, voice production, and performance. A part of this teaching process is performing the music as it has been taught. One of the avenues an American Choral Directors Association member has is the invitation for his/her choir to perform on an American Choral Directors Association convention. The people in attendance at these conventions are members of the American Choral Directors Association. They attend the American Choral Directors Association conventions with the expectation of hearing outstanding choirs performing great choral literature. Much of this literature would represent new compositions often heard for the first time on an American Choral Directors Association convention. The members attending these conventions are coming to

learn new music, new ideas, and new performance techniques--all of which are teaching devices and part of choral music education. Our conventions are an excellent resource for composers, thus giving great exposure to more than three thousand choral directors in attendance, with the posssibility of selling hundreds of thousands of additional copies of their choral music. Indeed, the American Choral Directors Association National Co..vention is one of the best resources for introducing choral music to a vast number of choral conductors, all in one concert setting. It is a great opportunity for choral composers to be introduced and for their music to be introduced to a large number of choral directors, thus giving their name great exposure at the same time. I believe the conventions of the American Choral Directors Association are a great asset to the composers of this country, and they also enhance the possibility of selling thousands of additional copies of their publications. This exposure is also an asset to the American Society of Composers, Authors, and Publishers.

The members of the American Choral Directors Association also pay royalties when they produce an album, a compact disc, or a tape. They have already paid the purchase price of music in addition to these royalty fees. Many institutions pay a performance fee for their choirs to perform as they represent their school, college, university, etc. Therefore, it seems the majority of the groups have already paid a performance fee prior to coming to perform on an American Choral Directors Association convention. It seems that the American Society of Composers, Authors, and Publishers would be paid a performance fee two times if indeed a license fee is required to perform on an American Choral Directors Association convention program. The vast majority of these performing choirs are from educational institutions or from nonprofit entities such as community choirs or church choirs.

In many states of the United States of America, fine arts organizations such as performing choirs are experiencing severe cutbacks in funding from their institutions or from their states. It would appear that such organizations as the American Society of Composers, Authors, and Publishers could be a great source of support for these performing organizations. The joint cooperation between the American Society of Composers, Authors, and Publishers and the American Choral Directors Association to ensure that choral music is supported and continues to thrive would be in the best interests of both our organizations. We need to encourage our composers and we need to encourage our performing choirs in this most difficult time of economic austerity.

I believe the composers who are members of both the American Society of Composers, Authors, and Publishers and the American Choral Directors Association would agree that the American Choral Directors Association convention is a great platform from which to introduce their music to the choral profession. I, therefore, am requesting that the conventions of the American Choral Directors Association be exempt from the American Society of Composers, Authors, and Publishers licensing fee. I believe this exemption would be in the best interests of both organizations and would result in the continuation of a harmonious relationship between the members of the American

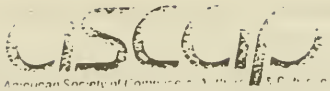
Choral Directors Association and the American Society of Composers, Authors, and Publishers.

Please accept my sincere thanks for your efforts on behalf of the American Choral Directors Association and the American Society of Composers, Authors, and Publishers. I look forward to a long and cooperative relationship between our two organizations.

Sincerely

Gene Brooks

Gene Brooks
Executive Director



Tab 5

October 30, 1991

Mr. Gene Brooks
Executive Director
The American Choral Directors Association
P.O. Box 6310
Lawton, OK 73506

Dear Mr. Brooks:

Mr. Robert Kautz, District Sales Manager for ASCAP's Dallas District Office, has referred to me your letter of October 9, 1991. I would like to address the many pertinent issues regarding the ACDA and ASCAP in the order that you raised them.

ASCAP appreciates that the American Choral Directors Association endorses cooperation with the United States Copyright Law in it's membership application forms and in the choral journal. However, lawful performances of our members' copyrighted musical compositions at the ACDA's National and Regional conferences would come under the heading of compliance with copyright law, and would thus require that the ACDA enter into ASCAP's license agreement for Conventions, Expositions, Industrial Shows, Meetings and Trade Shows.

You indicate that the membership of the ACDA purchases music each year to be performed by choirs which they conduct. Please note that purchase nor rental of music does not constitute permission to perform music in public. Although these students who will be performing at your conventions have been taught the music in the context of face-to-face classroom teaching, the performances at the conference do not represent an educational usage and would therefore not be exempt from any licensing.

It is true that performances at the ACDA National and Regional conventions do present an excellent showcase for our members' works to be heard by choir directors all over the country. However, I must take exception to your statement "this exposure is also an asset to the American Society of Composers, Authors and Publishers". ASCAP, as a performing rights society, is charged by it's members to license public performances of all musical works in our repertory, which would include all such performances at the ACDA National and Regional Conventions.

With regard to your indication that your members pay royalties when producing an album, compact disk or tape, please note that ASCAP does not grant mechanical licenses and, of course, royalties are paid directly to the copyright owners when making a recording of copyrighted music. However, as indicated earlier, the purchase of the music, whether to be recorded or performed in public, does not constitute permission to perform the music. And, if any of these recordings are played during the course of the convention, that airing constitutes a public performance and would require a license.

Regarding student performing groups, ASCAP's college and university license strictly covers performances that are sponsored by the college or university. Thus the college and university license agreement would not cover performances of the college choirs at the ACDA convention, as those performances are under the sponsorship of the ACDA, which is promoting and producing the event; and, any license fees paid to ASCAP by the ACDA under it's convention license agreement would not be duplicated by a college and university license agreement.

Please also note that the status of a presenter or performing organization as "non-profit" does not exempt it from the requirement to obtain authorization to perform copyrighted music at concerts, conventions or anywhere in public. The copyright law does provide a limited exemption for certain non-profit performances. Section 110(4) of the copyright law exempts public performances of copyrighted musical compositions from liability if <u>all</u> three of the following conditions are met:

1. There is no purpose of direct or indirect commercial advantage;
2. There is no payment for the performance to the performers, promoters, or organizers;
3. There is no direct or indirect admission charge or alternatively if there is an admission charge, the net proceeds are used exclusively for certain specified purposes. In cases where there is an admission charge, however, the statute provides a procedure under which copyright owners may nevertheless serve a notice of objection which negates the exemptions.

As performances at the American Choral Directors Association Conventions do not qualify for exemption under the United States Copyright Law, it is therefore necessary that the ACDA and it's affiliated regions enter into a license agreement to lawfully perform our members' works at your functions. I am again enclosing copies of the license agreements for your review and if you have any questions regarding this, please feel free to contact me.

Cordially,

DEBORAH L. METH

DLM:e
Encl.

cc: Robert Kautz
District Sales Manager

ascap
American Society of Composers, Authors & Publishers

Tab 6

Deborah L. Meth
MANAGER
EDUCATIONAL AND SYMPHONIC LICENSING

(212) 621-6407

January 29, 1992

Mr. Gene Brooks
Executive Director
American Choral Directors Association
P.O. Box 6310
Lawton, OK 73506

Dear Mr. Brooks:

As per our telephone conversation of January 10, 1992, I am again enclosing copies of the ASCAP license agreement for Conventions, Expositions, Industrial Shows, Meetings, and Trade Shows. Please be advised that until the American Choral Directors Association's National and Regional conventions are licensed with ASCAP, all unauthorized performances of our members' copyrighted musical compositions have and will continue to constitute infringements of the respective copyrights under the United States Copyright Law.

As discussed, we would be happy to address your Executive Committee at your Chicago conference with regard to licensing issues.

I look forward to hearing from you.

Cordially,

DEBORAH L. METH

DLM:e
Encl.

ascap

December 1, 1992

Tab 7

Dr. Gene Brooks
Executive Director
American Choral Directors Association
P. O. Box 6310
Lawton, OK 73506

Dear Mr. Brooks:

Your file has been referred to me for final disposition. I note from reviewing said file that you have had numerous contacts from our managers and many letters from Ms. Deborah Meth. I have been assured by all parties that they have discussed the convention license with you and that you feel there is no need for your association to have said license.

If you change your mind and would like to discuss this, please feel free to contact me in my New York office at 1 Lincoln Plaza, New York, NY 10023 or phone 212-621-6416.

If I have not heard from you by the time your next convention is held, you may rest assured that ASCAP will take whatever steps are necessary, up to and including litigation, to protect their members' copyrighted musical compositions.

Very truly yours,

Robert E. Light
Regional Sales Director

REL/bab

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

ACDA CONVENTION
SHEPLER CENTER, CAMERON UNIVERSITY
LAWTON, OK

August 15, 1993 Tab 8

QUESTION AND ANSWER PERIOD ASCAP

DEBORAH METH

Good morning, thank you for being here at this hour, and thank you for two rounds of Happy Birthday, which is happily an ASCAP song. For those of you who may not be familiar with ASCAP, the organization, and what we do, let me give you a brief overview of the history of ASCAP and how the organization operates. ASCAP, the American Society of Composers, Authors and Publishers is this country's oldest performing rights organization founded in 1914 by a group of composers and publishers, including Irving Berlin, Victor Herbert and John Phillip Sousa. The reason it was founded because these gentlemen were very active in the music field and would go to restaurants and hotels and hear their music played without their permission and in ways they did not approve of. The copyright law was established in this country to protect intellectual property, including music. They formed ASCAP in order to protect their work and allow users to use their music lawfully and enable them to benefit for the payment of royalties, which, under the law, they were entitled to. Since 1914, ASCAP has grown into a huge membership organization, run by and for its members. It is an unincorporated membership organization and is not a business, and is not a for-profit organization. It is run by a 24 member Board of Directors, 12 of which have to be designated as writer members, composers, and 12 who are publisher members. It is run by a board. Its members are unlike other different licensing organizations in this country. They set the policy and establish how the organization is run. Since the founding it has grown into a network of several membership offices. We have our headquarters in New York, we have membership offices in Chicago, Nashville, Los Angeles and in Puerto Rico and London, and we also have licensing offices throughout the country that cover what we term general licensing.

ASCAP activities are divided into several large areas. To simplify, its broadcast licensing includes radio and television, and general, which includes everything else, which could be from a meeting or convention, such as this, to a shopping mall, bar, restaurant, concert hall, symphony orchestra, college or university. What we do is establish a particular type of license to meet the needs of the user, based on a particular criteria. For instance, the license for conventions, meetings and trade shows based on the attendance where live and mechanical music is used, the license fee for a concert would be based on the seating capacity of the hall in which the performance takes place, and the

top ticket price as charged. A fee for college or university is based on the full time equivalent enrollment. We establish many different types of license agreements as are deemed needed by the music staff. ASCAP is a service organization, not only to its members but to users of our members' music and we want to make it as easy as possible for a person's music to be played but also enable them to receive the royalties they are so rightly entitled to. There is a federal copyright law in this country that protects the rights of the creators of music. It also gives them the right to perform, to publish, to reproduce and to make creative works. All these rights, rather than the copyright owners, are members. When they join ASCAP they give us what we call a nonexclusive right to license pieces of music on their behalf. But if music is being used in such a large capacity it is easy to obtain a blanket license from ASCAP and enjoy the benefits of all of the music of our members instead of spending a lot of time and money contacting each individual copyright owner. ASCAP not only licenses on behalf of its members, or composers and publishers in this country, but we have reciprocal agreements with foreign rights societies all over the world. We protect the rights of some of their members here and they do the same for us in their country. A lot of you perform works that are not American works and when we collect royalties for foreign writers those monies are distributed back to the foreign societies so those copyright owners, publishers, composers, receive performing royalties for that. That is basically an introduction as to what ASCAP is and what we do. Since you have a lengthy list of questions, why don't I just get to the list, and if someone has another question, we can interject them and then take some questions from the floor.

The first question submitted:

How do you formulate a fee? What percentage goes to the publisher, the composer, overhead, administration, etc? Please explain the licensing fee structure as you believe it applies to our conventions. Would the factoring of such a license be consistent year after year.

This question, and all the questions on this list, were addressed in the history of our correspondence, not negotiations per se, but in discussions with the organization. We started speaking to representatives of ACDA two years ago and Mr. Kautz here met with Mr. Brooks a couple of years ago when he first wrote you about the subject of having a license for the performance of music at your convention. Most of these questions have been addressed in correspondence and live conversations. I know of four separate occasions with representatives from these organizations. Some of you may not be aware of the history of our discussions with the ACDA and may not be up to date on the license question so I will go over it again, but they basically have been covered. As far as the fees are concerned, as I said earlier, we establish fees for different uses and the convention license, which is shown in the accompanying brochure, that is the license we offer to all

groups who hold meetings, conventions and trade shows. The fee is established at certain dollar amounts, per attendee, and there is a fee for live music and for mechanical music. ASCAP, because of a decree set down by the federal government, we have to offer you the same licenses as other groups who have conventions. We cannot discriminate. We cannot say to your group we will give you a few cents off this fee and say to another group, we are going to charge you eight cents more. We have to offer you the same license as to other groups that have conventions. The fee has to remain the same. That fee is established each year, and it is increased based on CPI, so the fee may change every year.

Question: Do you treat performances, workshops and reading sessions differently?

ASCAP does not establish its own licenses and parameters. We have to do business under the requirements of the copyright law and the copyright law establishes that a public performance does fall under our licensing law. The public performances law states that it is outside the family performance and we do not license performances at weddings and private parties, but anything outside the family and circle of friends is a public performance and any use of copyright music will require permission, and that permission, as I said earlier is available in the form of a license from us carried out directly from the members to obtain that permission.
Any other questions on these first two?

Question: You didn't really address a couple of sections on that first question, would you do that please?

While I set out these formerly, but, what percentage goes to the publisher, the composer, overhead, administration? ASCAP structure dictates that 80 percent of each dollar received from licensees has to go to the members. The operating cost has to stay below a 20 percent cap. So 80% does get distributed to the membership. It is not invested, or anything. Everything is distributed every year. Does that answer your question?

Question: Is there a distinction made between a professional and amateur choir's performance?

No, there is no distinction made between any kind of performance, whether it's amateur, professional or semi-professional. If it qualifies as a public performance then there has to be permission obtained for that performance of music.

Question: Are you assessing fees only for ticketed concerts and conventions? What about free concerts?

Under the copyright law Section 110 (4) there is certain limitations for non-profit performances, but several conditions

have to be met, and that is not just a free concert; it has to be a registered 501 (C) 3 non-profit organization. Something like the New York Philharmonic is a non-profit organization, and they, of course, have to have a license. The limitation on certain non-profit performances in order to qualify to not have a license the conditions have to be met that there be no commercial or non-commercial advantage, that no admission be charged, that none of the performers be paid, or if admission is charged, all proceeds have to go to charity and the copyrighter does not object. Usually, all conditions are not met. At conventions registration fees are charged, and money does change hands. So that allows a non-qualifying case in conventions. Free concerts, as I said, if a concert has no admission charged, and no performers are paid, or there is a suggested donation they might qualify for exemption, but all exclusions would have to be met. Any questions about that?

Question: (could not understand the person - too far across the room)

Yes, it does. Any type of honorarium or payment is the same.

Question: (same person, could not hear, nor the tape pick up, following is best I could make out). If it is done for educational aspect throughout the year, and you are not performing throughout the year, the performance involved is the last--the performance aspect of it--this person is not being paid for that performance but if the work they have done throughout the season; can you clarify that?

You are not basing a fee in this respect on the person's annual salary for their services, but they are being paid, and there is payment to the performers and organizers, so that is a payment.

Question: Many performing choirs at our conventions come from institutions which already hold an ASCAP blanket license. Would not a license for a convention constitute paying twice (double dipping)?

Absolutely not, it does not constitute payment twice. The ASCAP licenses only cover uses for which that particular licensee is promoting. If you, the ACDA, at a convention is sponsoring the event inviting the performing groups, then you are responsible for the license. If, at the convention, several groups from colleges and universities came and performed here, those groups holding universities' licenses would not apply to these performances because college and university licenses, as other ASCAP licenses, only cover the performance promoted by the college or university, it does not cover performances off the campus or at another organization's meetings, such as you have. It is sponsored by another organization, so it is not double dipping, the performances are not counted under the other license agreements.

Question: (from the floor) If from our college or university a group goes out on tour, such as to high schools, other colleges and churches, is that covered under the institution's license?

It is only covered if it takes place at places that have been obtained by the college for use by the college. If the college is renting a hall or space in every town and promoting the concert and being responsible for all its promotion and any financial liability that is covered, but that is usually not the case. Usually the local organization is promoting the choirs, and they would be responsible for the license fees and the college or university license would not cover those performances.

Any other questions on that?

Question: (from the floor) In going back a little bit, what about reading sessions--(could not hear nor pick up)--we are talking about a performance that does not have to have people who are performers--?

It doesn't have to be an audience.

Question: (from the floor) I am still confused. If a choir from a university goes to a convention usually the university pays for the costs for that choir to perform, with the exception of the hall, so, are you saying that as long as the university takes responsibility for the performance they have a license--(could not hear or pick up)--what about the transportation and everything having to do with that choir, with the exception of the hall--

If the university choir comes to perform at a national convention, the university is not running the convention, they are not sponsoring the convention.

Question: (from the floor, same person) That is true. I was just confused because in your wording you are talking about the responsibility for promoters.

Let me give you a clearer example. What university do you teach at? (Answer: Oregon) If Oregon decides to take their choir to New York and rents Carnegie Hall and promotes the concert, pays a rental fee, they are acting as the presenter for that event. Then, yes, their license will cover that, because they have totally arranged for that performance, that space, off the campus. If that same choir comes to an ACDA convention, the university is not acting as a promoter but as a presenter of that performance, the ACDA is, is that clear? (Answer: yes).

Question: (from the floor) If two pianists, a dual piano team, get together to practice and learn a piece, is that a public performance that is subject to license?

If anyone is listening outside of the piano team that is a performance. If you are in a practice room that constitutes a public performance.

Question: (from the floor) If a group of people gets together to learn a piece, to read a piece, and there is no one listening other than the people who are there to do it, is that a public performance subject to license?

As I said, if somebody gets together in somebody's home to sing some pieces, that is not considered a public performance as such, but people are walking out in the hall and you people are singing here, that could be considered a public performance, anybody can walk in here and listen.

LIGHT: I don't think that ASCAP is attempting to license any organization that practices music. If there is a situation out here that you are aware of, please bring it to our attention. We are not trying to license two people, four people that are sitting in a room and attempting to learn music, or attempting to learn how to play that piece. That is not our intent.

Question: I would like to ask, on that same subject, this morning we sang two pieces prior to our session with you. That, in essence, is what we do in terms of a reading session. Would we need to be licensed for that?

LIGHT: Yes, in answer to your question, yes, I will tell you why. It has already been proven in court, that more than 20 people, they went just to 20 now, there may be a court case later that is going to go lower; 20 people constitutes other than a group of friends or family. Right now, it is like a radio speaker, a precedent has to be set. So far there has been a precedent set for 20 people. Was there another question over here?

Question: A gentlemen over here asked about a reading session clarifying a point. If you are not interested in licensing rehearsals of music we are saying that all reading sessions are less than rehearsals. They are usually persons experienced in reading the score, relying on us to purchase or not purchase that music for use in the future.

METH: But most of your reading sessions take place within the confines of a regional or national conference where you are paying for that --

AUDIENCE RESPONSE: No.

What reading session are you referring to?

Response: (from the floor) I am talking about reading sessions that occur in the community, district, or regional conference

level, as well as on the state, district and national level, we do that kind of thing wherever a few of us get together.

Outside the context of your national, regional--?

Response: (from the floor) That is the way we communicate in music, one to another.

Question: (from the floor) In licensing, you mentioned universities and colleges, how many elementary schools, middle schools, high schools and churches have been licensed?

Meth: That question doesn't come from this list. ASCAP is not actively out there licensing elementary and secondary school performances, even though under the law they are not exempt from licensing, if they don't meet the requirements of an exemption, because there are so many performances that we have to track across the country to have to take the time to license all these performances there would be nothing left to distribute to the members, so we concentrate more on performances on a college and university level. But, if the high school, secondary or elementary school calls and says they want a license, we will happily give it to them.

LIGHT: Many high schools are licensed by ASCAP, at their request. They have come to us and ask for a license, therefore, any group that asks us for a license under the copyright law, we must give them a license, so, therefore, we give them a license. So there is high schools out there (I don't know of any grade school that has been licensed) that are licensed.

METH: There are many churches that are licensed.

HATCHER: Could I ask the members here, it might be a little clearer if we would allow her to continue with the prepared questions completely, and this might answer the questions you have, and then open it up.

METH: Question: Why has ASCAP been unwilling to recognize and acknowledge a difference in functions between conventions of music educators (such as those sponsored by ACDA, MENC, and similar organizations) and more commercially oriented trade shows and conventions?

I answered that earlier. This is the license we offer to all our conventions that hold meetings and trade shows. We do not differentiate between a commercial or non-commercial or non-profit or for-profit organizations. This is the license we have established to meet the needs of all the users in this area, and there are many musical organizations, such as these, across the country that have this license and feels it gives them the best way to perform as many ASCAP works as they want to at their meetings and pay a cost effective fee. Money that goes into licensing, that

is just the cost of doing business, so it should be factored into your budgets.

Question (next part): Can ASCAP not develop separate fee structures for conventions of music educators which acknowledges the contributions which such events make toward promoting the creative work of composers?

ASCAP does not differentiate between users. It is not whether you are music educators or computer software educators. Most situations people come to meetings, they come to learn and to grow. If you are in the music field, or whether you are in the computer field, or the food industry.

Question: Have ASCAP composers and publishers been contacted on this pursuance of license from ACDA and are they in philosophical agreement with ASCAP?

ASCAP members rely on us to license all performances of their music. We do not take a poll of our members to see if they want us to license particular music. They count on us to be protecting their rights in all facets of performances around the country. But, I myself, have personal exposure to several ASCAP members who are members of your organization, and they are simply dismayed that the organization has not been licensed, and sometimes these people have particularly been invited to showpiece their work at your conventions, so they count on us to make sure that these performances are licensed.

Question: To what extent will ASCAP composers heard in ACDA conventions benefit from an ASCAP license for that convention?

ASCAP pays its members based on surveys of different performance criteria and we are establishing a criteria for performances for conventions, meetings and trade shows. That will be set forth very soon as to how the members performances in this area will be credited to them.

Question: ASCAP annually awards Chorus America a monetary award for adventuresome programming. Would ASCAP be willing to establish such an award for ACDA?

Well, the Chorus America awards doesn't go to the organization per se, it goes to the member choirs. They administer the award. All we do is provide the cash for the awards and the plaque to be awarded, and they hire a panel to judge for adventuresome programming. We would be happy to discuss that possibility with ACDA, but any type of award like that, that has to go before the ASCAP Board of Directors, and they have to vote as to whether or not that award will be established. We do give awards not only in the choral field, but for chamber music, Chamber Music America, and

for the oldest award through the American Symphony Orchestra League for orchestras with adventuresome programming.

Question: Would ASCAP consider negotiating a new fee structure with ACDA?

Yes. As Mr. Light pointed out, ASCAP is beholden to grant a license to anyone who comes to us and requests one. So if ACDA is not happy with this structure and rates of our established convention license, you can come to us and say, we want to talk about a different license, and we are happy to sit down and talk to you, but we feel that this license here meets your needs and the needs of the whole community that holds meetings, even from the smallest organization, and we specifically tailored that license to address the needs of different organizations with different scopes. Mr. Light has added that any user of music that is not happy with the rates that ASCAP tells you, can apply to the Southern District Court of New York, Federal Court, for a rating hearing, or a interim fee, and then through that process a different fee may be established.

Question: Would ASCAP be willing to negotiate a blanket license that would cover all ACDA activities at the national, regional, state and local levels for a specified period of time?

We would be happy to. With national license we have many other courses. It is easier administratively to cover all your activities under one license rather than having a license for each of the seven regions. We want to make it as easy for you to enjoy a simple license and perform as much of our members music as you like.

Question: Is there, or could there be, an ACDA representative on the ASCAP board?

As I said earlier, ASCAP's board has to be comprised of 24 members, 12 are publisher members, 12 are writer members. The members are not appointed, they are elected annually by the membership. So it could be possible that an ASCAP composer, who is also an officer in ACDA could possibly be elected to the ASCAP board. But that is the only way. We could not say; Okay, we want Bill Hatcher to serve on the ASCAP board. That is not the way the organization is set up.

That completes the formal questions. We might have time for some more.

Question: Looking at the license agreement, it appears that it is granted on the time rather than on the performance. Is that correct?

Yes.

Question: So, in other words, a high school, college or university wanted to go on tour then they would be able to apply for the entire tour?

These licenses are on a different criteria. If we license a choir that goes on tour, or performs locally, they have a license based on a different rate scale. This is based on the seating capacity and the top ticket price. They have a choice between a blanket license, and a different kind of license. The easiest one is to get a blanket license to cover all the performances. That would cover both live music and mechanical music, recordings being used. That license covers all those uses.

Question: The national organization, American Band Masters, what have they negotiated with you?

We have many music organizations. We are in discussion with many other groups. American Symphony Orchestra League, American Guild of Organists, and other similar organizations.

Question: Those organizations you are talking about seem more commercial or professional organizations. We are a group of teachers. MENC is teachers. American Band Masters is teachers. Have you met with MENC or Band Masters organizations?

ASCAP has met with MENC. The question, so far as the educator is concerned, does not automatically exempt the performances from being licensed. I realize you are educators. There are other industries that are educators. People go to the meetings to learn, to get new ideas and go back to their regions and try out those ideas. So, the performances at your conventions are not educational in nature as required under copyright law, so that would not qualify for an exemption.

Question: The intent of the copyright law is to protect the work of composers to encourage their continued work. It seems that having the same schedule for these performances for commercial trade shows, and for educational institutions, while it may fulfill the letter of the law, does not seem to fulfill the intent of the law. Because of the educational interest the composer promotes exposure, which promotes sales, which provides meaningful relation to their work. Has any consideration be given to make that distinction, not of the letter of the law, but the intent of the law.

LIGHT: First of all, we three are not attorneys to sit and argue that. If attorneys were involved, all attorneys are not going to agree. If it came down to our attorney versus your attorney, it is going to be their fight. We are trying to eliminate that now. We feel, ASCAP, that your organization is using our members' musical compositions, therefore, they are entitled to a royalty. We have offered the same license agreement as we offer to other

organizations, regardless of what kind of group, whether or not it is an educational group. The reason is very simple. We have set down with administrators a license agreement for each and every organization out there. Your rate is going to be so high you are going to wonder how can you afford to pay it? We have probably 75-85 different kinds of licenses. We have 26 offices out there, with seven representatives in Oklahoma and Texas. Out main thrust is for restaurants, bars, hotels, skating rinks, concert promoters. We have two people that handle the serious music aspect, your kind of music and colleges and uhiversities. If we start doing this, giving you a special rate, and that person a special rate, and that person a special license, our members would not stand for it. They would be after us. We have to give them back 80% on every dollar we collect. We can only operate on a 20% margin. You try to work on a 20% margin. It is tough.

Question: (could not hear, nor would tape pick up)--would it be better--by what method would be the most beneficial for us--

LIGHT: We feel that this is the license agreement that we can offer you. (He was not on the microphone, and in the back of the room, could not hear him).

Question: My question is a little bit different. You are taking it from your point of view. I am asking what would be the best for us?

Light: We feel that this license agreement is the best one for your organization, and is the best for us.

Question: Why is it best for you and why is it best for us? We don't know that.

Light: We still contend it is the best license for you. You have to prove to us it is not. Let's face facts. If we change it for you, everybody in the country would want it changed, and they are not going to do it. You would have to go to court and fight it out. Why bring a lawsuit? I have been trying to talk to your group for over two years. We have a file here. I will give you all copies of the letters. We asked for a complete list of your people and wanted to write to each and every one of you. We are still trying to get the facts to you so that you can make a decision as to what you want to do. I am pleading with you to look at this thing. I am not trying to jam something down your throat. This has been going on for two years.

Question: Could we get some idea if the blanket license is the best way for us to go, what would that cost be and what facts and information would you need?

Light: We said it would be the best way for you to go, and the cheaper way to go would be a blanket license. Many blanket

licenses are out there. With a blanket license, we do not have to have the personnel to keep files going. On a blanket license you can submit reports to us, you would pay as set up, and you would send us the payment.

Question: What would that be?

I cannot tell you that.

Question: (could not understand him, too far way)

I would assume that if the organization entered into a national agreement with ASCAP everyone that belonged to your organization wouldn't be a member. That would be up to your organization.

Question: Would my college be exempt for my performances with my national agreement with ACDA?

No. The college and this is completely different. She (Meth) explained that fifteen minutes ago.

Question: I don't think that this has been addressed. You said that 80% of the fee money goes to the members. We, as choral directors, have a certain set of composers that we perform most of the time. They are not usually the commercial composers that you deal with when you go to bars, hotels, restaurants, and elevator music, and all of that. What guarantee is there that our composers, when we perform, are going to get this 80% of our fee money?

METH: I think I covered that earlier. ASCAP pays its members based on surveys of different performance criteria. Right now we are formulating a method to credit performances of any of our members in the convention field.

LIGHT: ASCAP has a general fund, that we put our general money in, such as choir ensembles. When it gets into serious music, we give everybody credit. For a serious composer, every time his work is picked up he gets three credits instead of one. Each credit could run anywhere from $850 - $950 per credit, and don't hold me to this, it could change, it is not written in stone. It is picked up in the survey. If a person wrote "Proud Mary" gets picked up in the survey, she may get $850, but a serious composer could get three credits, she gets one he gets three. It depends on what the factors are. Serious music should get more credit than others.

METH: That is why every performer that is licensed will get credit for it.

Question: I don't think I heard anything asked about a district music festival, high school activities sponsored music contest.

LIGHT: ASCAP is not licensing at that level. Not that we do not license high schools but a high school is not licensed unless they come and ask us for a license. We are not calling on high schools.

HATCHER: I am sure that we are all aware that we have a lot of talking to do about this. It will be a prime item on our agenda at our board meetings very soon. We thank you for coming all of this way.

THE AMERICAN CHORAL DIRECTORS ASSOCIATION
NATIONAL HEADQUARTERS / THE CHORAL JOURNAL
Post Office Box 6310 Lawton Oklahoma 73506
(405) 355-8161 FAX (405) 248-1465

August 20, 1993

Tab 9

Ms. Deborah Meth
ASCAP
One Lincoln Plaza
New York, NY 10023

Dear Ms. Meth,

Thank you for sharing information concerning the ASCAP organization and in particular an explanation of the ASCAP licensing agreement for conventions, expositions, industrial shows, meetings and trade shows at the ACDA National Leadership Conference on August 15, 1993.

The Board of Directors of the American Choral Directors Association met on Monday, August 16, 1993 and decided to secure legal counsel to assist the organization with the negotiation of a future agreement with ASCAP concerning ACDA conventions.

Sincerely,

John B. Haberlen
President

CC: ACDA National Board of Directors

PRESIDENT
JOHN HABERLEN
School of Music
Georgia State University
Atlanta GA 30302

VICE-PRESIDENT
WILLIAM B MATCHER
School of Music
University of Iowa
Iowa City IA 52242

PRESIDENT ELECT
LYNN WHITTEN
College of Music
University of Colorado
Boulder CO 80309

TREASURER
ELAINE McNAMARA
1342 S Ocean Blvd #402
Pompano Beach Florida 33062

CHAIR
PAST PRESIDENTS COUNCIL
DIANA J LELAND
6641 River Avenue South
Minneapolis MN 55423

EXECUTIVE DIRECTOR
GENE BROOKS
P O Box 6310
Lawton Oklahoma 73506

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Department of Music
Kansas State University
Manhattan Kansas 66506

WESTERN DIVISION
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23514 Susana Avenue
Torrance CA 90505

INDUSTRY ASSOCIATE REPRESENTATIVE
ROBERT SCHUNEMAN
E C Schirmer Music Co Inc
138 Ipswich St
Boston Massachusetts 02215

EDITOR
THE CHORAL JOURNAL
JOHN SILANTIEN
Division of Music
University of Texas at San Antonio
San Antonio Texas 78249

APPENDIX 5.—LETTER FROM DIANA WATERMAN, WASHINGTON REPRESENTATIVE, TELEVISION MUSIC LICENSE COMMITTEE, TRANSMITTING A STATEMENT OF THE TELEVISION MUSIC LICENSE COMMITTEE, TO HON. WILLIAM J. HUGHES, CHAIRMAN, MARCH 16, 1994

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WATERMAN & ASSOCIATES
GOVERNMENT RELATIONS
900 2ND STREET, N.E.
SUITE 109
WASHINGTON, D.C. 20002
(202) 898-1444
FAX (202) 898-0188

March 16, 1994

The Honorable William J. Hughes
Chairman
Intellectual Property and Judicial
Administration Subcommittee
Judiciary Committee
207 Cannon House Office Building
Washington, DC 20515

Dear Chairman Hughes:

Enclosed for your information is a copy of the statement submitted by the Television Music License Committee for the record in the hearings recently conducted by the Intellectual Property and Judicial Administration Subcommittee regarding "Music Licensing Practices of the Performing Rights Societies."

Should you be interested in any further information, please feel free to contact our office.

Sincerely,

Diana Waterman

Diana Waterman
Washington Representative
Television Music License Committee

DW/pe
Enc.

TELEVISION MUSIC LICENSE COMMITTEE

515 MADISON AVENUE, SUITE 912
NEW YORK, NEW YORK 10022

(212) [illegible]
FAX (212) 754-9286

Statement of the Television Music License Committee
before the
Subcommittee on Intellectual Property
and Judicial Administration
of the
House Committee on the Judiciary

Regarding
Music Licensing Practices of the Performing Rights Societies
March 11, 1994

The Television Music License Committee has represented local television broadcasters from all across our nation for the past five decades. Today, virtually all local television stations rely on the efforts of the Committee to pursue fair and equitable license arrangements with both ASCAP and BMI.

We would like to commend Chairman Hughes for conducting hearings on music licensing practices of performing rights societies and to thank him for the opportunity to submit this statement for the record.

The issue of music licensing practices of the performing rights societies as it applies to television broadcasting has been a singular dedication of the TV Music License Committee since its inception. We have dealt with almost every aspect of this debate at the bargaining table, before Congress, and, of course, in court.

We believe we offer a unique perspective on two specific issues of focus raised by Chairman Hughes and by several witnesses in these hearings regarding:

1) ASCAP's adamant resistance to a meaningful per program license; and,

2) the critical need for users to have ready access to the societies repertoire database.

These issues raised by the witnesses on February 23 and 24, 1994 are not new. In fact, they are the very same issues and the very same problems that were the subject of hearings before this sub-committee in 1986 when we testified in support of source licensing.

At that time, Congress suggested that we might find recourse to a meaningful per program license through a case we had pending before the ASCAP rate court. The TV Music License Committee has recently concluded that long and drawn-out ASCAP rate

court proceeding -- now on appeal to the Second Circuit. We believe that after 10 years of litigation we bring a truly unique perspective to bear on these issues.

It is actually somewhat dismaying that in the eight years since we originally testified before this subcommittee some things just haven't changed. You heard overwhelming testimony in 1986, and again in 1994, about ASCAP's persistent bully tactics. You heard in 1986, and again in 1994, about ASCAP's stalwart resistance to allowing for a meaningful per program. You heard in 1986, and again in 1994, about ASCAP's refusal to provide the essential repertoire information, that only they hold, and still will not make available.

One important thing has changed for the television industry -- that is the first-ever utilization of ASCAP and BMI per program license by hundreds of local television stations. This inaugural per program experience did not come about easily for the television industry. It has taken a long, tough, costly, legal battle and it's not over yet as ASCAP has appealed the decision.

A review of the history of ASCAP's negotiations with the television industry over the last 12 years specifically with respect to the per program license, makes it abundantly clear that ASCAP has consistently done all they could to block local television stations from pursuing the per program license. Indeed, throughout the course of the court proceeding, ASCAP maintained that the per program license "was never contemplated" to be for the typical television station, but instead was intended only for an "oddball" station, such as one "that carries stock ticker reports all day long that may have some music behind them." Trial Tr. at 494-503.

In fact, ASCAP's specific per program proposal to the rate court -- calling for a license rate four times that of the blanket license -- was intended to ensure that only such "oddball" stations would find resort to this license option economically feasible. Just to make sure, however, that no station could actually utilize its proposed per program license, ASCAP also took the position that a full per program payment was due if only a single commercial announcement within or adjacent to a program contained a few bars of ASCAP-licensed music -- such music is typically selected and incorporated by the producers of commercial announcements, not by the stations. ASCAP failed to persuade the rate-court of the merits of this position. The Court rejected ASCAP's 4-to-1 per program-to-blanket ratio in favor of a per program option priced at 1.4 time the blanket rate.

Despite all of this, ASCAP continues to engage in a variety of tactics to keep television stations from utilizing a per program license. The following examples are only the most recent in an historical series of actions adopted by ASCAP with the goal of denying the economic relief afforded by a viable per program license option:

** ASCAP's conditioning of prior settlements on both blanket and per program license terms on broadcaster agreement to a proviso that few, if any, local television stations would operate under the per program form of license;

** ASCAP's historical refusal to accede to requests by the Antitrust Division of the Department of Justice to modify aspects of the per program license so as to make that license option a more meaningful one;

** ASCAP's attempt to modify its consent decree so as to relieve it from the obligation to offer a per program license to any television network which maintained a blanket license with BMI. The request was rejected in a Court opinion which reflects a resounding endorsement of the competitive goals underlying the Decree's requirement that ASCAP offer this option to its "preferred" blanket license, and price these license so as to provide users with a "genuine choice" between the two license forms;

** ASCAP's unsuccessful attempt -- after significant rate court efforts by local television broadcasters had resulted in a viable interim per program license -- to be relieved of its obligation to offer this very interim license option because some 250 local stations had actually elected to operate under this Court-mandated per program format; and,

** ASCAP's refusal to offer a per program license to cable program services (such as CNN, ESPN, USA Network and others) on the purported theory that its consent decree obligations with respect to per program licensing did not extend to "cablecasters" -- as opposed to "telecasters." When challenged in Court, ASCAP's interpretation was rejected in an opinion affirmed per curiam by the Second Circuit Court of Appeals.

Although ASCAP has made every attempt to block resort to the per program license, the courts and the Department of Justice have consistently recognized the competitive need for this license option. Our industry's experience shows that -- unless dragged kicking and screaming into the world of per program licensing (and the more competitive licensing arrangements resulting therefrom) by legislative or judicial fiat -- the music licensing societies will forever attempt to impede the licensing of their repertories under any system other than a blanket license system.

Part and parcel of such efforts is a continuing insistence on restricting users' knowledge and ability to obtain information about the specific compositions in these licensing organizations' respective repertories. As the radio representatives appropriately emphasized in their submissions to this subcommittee, such knowledge is essential if users are to make informed choices regarding their music needs and licensing options.

With per program licensing opportunities becoming more and more of a reality for our industry, access to full information regarding the song titles licensed by ASCAP, BMI and SESAC is crucial to television stations' ability to make use of this license form and related competitive licensing opportunities.

Broadcasters, however, cannot make informed choices with respect to the use of a given piece of music, and the specific costs associated with performing that piece of music in their locally-produced programs, unless they can quickly and efficiently obtain the information necessary to render an informed judgement -- specifically, which licensing organization, if any, licenses the particular title at issue. Presently, that information is not readily available. If, as we believe, per program licensing and direct licensing by local broadcasters, as well as other music users, is a goal which ought to be encouraged, the licensing system must require the comprehensive identification of titles in each licensing organization's repertoire.

APPENDIX 6.—LETTER FROM BENJAMIN L. PALUMBO, PALUMBO & CERRELL, INC., TRANSMITTING A RESPONSE FROM ASCAP TO THE STATEMENT OF THE TELEVISION MUSIC LICENSE COMMITTEE, TO HON. WILLIAM J. HUGHES, CHAIRMAN, APRIL 20, 1994

Palumbo & Cerrell, Inc.

Public Affairs Counselors

1000 Connecticut Avenue, N.W.
Suite 706
Washington, D.C. 20036
(202) 466-9000
(202) 466-9009 FAX

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April 20, 1994

The Honorable William J. Hughes
241 Cannon House Office Building
Washington, DC 20515

Dear Mr. Chairman:

Enclosed is our response to a statement submitted to the Subcommittee by the Television Music License Committee following your hearings on this subject.

With best wishes.

Sincerely,

Benjamin L. Palumbo

BLP/tr
Enclosure

cc: Hayden Gregory

4-12

RESPONSE
of the
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS
to the
Statement of the Television Music License Committee
submitted to the
HOUSE JUDICIARY COMMITTEE SUBCOMMITTEE ON INTELLECTUAL PROPERTY AND JUDICIAL ADMINISTRATION

The American Society of Composers, Authors and Publishers (ASCAP) respectfully submits this response to the statement submitted to the Subcommittee on March 11, 1994 by the Television Music License Committee (TMLC). As we show below, the TMLC's principal arguments -- that ASCAP has resisted efforts on the TMLC's part to obtain "a meaningful per program license" and that ASCAP has refused to provide television stations with information as to musical works in the ASCAP repertory -- are refuted by both history and the reality of the marketplace, the manner in which music is used by local television stations.

History

The history of the dealings between ASCAP and the owners of the nation's commercial television stations dates back to the late 1940's. When television was in its infancy, the earliest licenses issued by ASCAP were gratuitous blanket licenses. In the wake of the entry of the Amended Final Judgment in United States v. ASCAP, the owners of a group of local television stations brought the first proceeding under Section IX of the ASCAP consent decree, seeking determination by the federal court of a reasonable fee for an ASCAP per program license. That proceeding was dismissed in 1954 when

the stations and ASCAP agreed on the terms for a per program license. In 1954, it was clear that the per program license was not intended for most television stations. Then, as now, television stations aired a large number of programs containing ASCAP music, so as to make impracticable a per program license the fee for which is calculated as a percentage of revenue from programs with ASCAP music.

From 1954 until 1985, the same per program license terms were offered to television stations. Indeed, although ASCAP and the radio station industry agreed on a radically new form of per program license in 1978, the television stations pursued another course, launching their antitrust attack against ASCAP and BMI at that time, Buffalo Broadcasting v. ASCAP and BMI, which ultimately resulted in rejection of the stations' claims that ASCAP's and BMI's licenses violate the antitrust laws.

When they were unsuccessful in their efforts to destroy the longstanding mechanism for licensing performing rights, the local television stations commenced a proceeding for determination of ASCAP license fees under the ASCAP consent decree (the Buffalo Broadcasting proceeding). Shortly thereafter, in 1986, the stations sought Congressional intervention -- they came before the Subcommittee seeking enactment of the so-called "source-licensing legislation." The Subcommittee was not persuaded to enact any legislation by that effort.

The Buffalo Broadcasting proceeding remains pending and is now at the appellate stage. As a result of the rulings in the case by Magistrate Judge Dolinger, ASCAP and TMLC have agreed upon most of the terms and conditions of a new per program license for 1995. This means that if the stations ultimately prevail, they will have the radically new per program license they say they have been unable to obtain previously. If ASCAP is able to persuade the Second Circuit Court of Appeals that Magistrate Dolinger erred in determining the fee structure for the new per program license, then the Court will further consider and resolve the issue. In either event, we believe that the Subcommittee should not even consider legislation mandating per program license terms until the results of the litigation are known.

---

*We should note as well that just last year, the TMLC's Executive Director and its counsel testified before the Canadian Copyright Board in support of the Canadian broadcasters' efforts to persuade the Board to mandate a per program license for Canadian television stations. Recognizing the inherent administrative inefficiency of a per program license, the Board denied the broadcasters' request for a per a per program license.

The Television Music Marketplace

Undisputed testimony in the Buffalo Broadcasting antitrust and Section IX cases -- and, indeed, readily viewable television broadcasts -- demonstrate the diversity of the television music marketplace. Music can be heard in a wide range of syndicated programs aired by local television stations: situation comedies, action-adventure shows, feature films, reality-based daily programs, talk shows, game shows, sporting events and even the occasional variety program. In addition, music is used in locally-originated programs like the evening news and local sports events.

Under the interim per program license arrangements that have been in effect since 1988, ASCAP has furnished its more than 250 per program television station licensees with music use information on thousands of programs aired by local television stations. On a semi-annual basis, ASCAP has furnished each per program licensee with an updated Interim Per Program List, identifying those programs, series and feature films that contain ASCAP music.

Of course, for most programs aired by television stations, information as to whether a particular song is in the ASCAP repertory is simply irrelevant. This is because most of the stations' programs are either furnished by the networks with which they are affiliated (and which are separately licensed by ASCAP), or are syndicated programs produced by third parties. In either case, the insertion of

music in the programs occurred during the production phase, and the stations exercise no control over the process. For stations that may actually desire to base their programming decisions on whether particular programs or films contain ASCAP music, the Interim Per Program List is specifically designed to enable stations to make such decisions.

With respect to programs produced by television stations, we are unaware of any station that has had any difficulty in obtaining information from ASCAP as to whether a particular composition is in the ASCAP repertory. There is simply no "restrict [ion on] users' knowledge and ability to obtain information about the specific compositions in [ASCAP's] repertor[y]."

Another note on music use information: For most of the programs aired by local television stations, it is the stations themselves that procure the programs from third parties. Thus, it is the stations who are best able to ensure that their program suppliers provide whatever music use information the stations say they need.

Finally, as the Subcommittee knows, ASCAP is in the process of implementing a system of on-line access to repertory information -- a system which has been in development since long before the recent hearings were scheduled.

The TMLC's Allegations Distort the Facts

We now reply briefly to the series of the allegations set

forth in the TMLC's statement which misstate the facts. First, it was the members of an earlier "All-Industry Television Station Music License Committee" who long ago agreed that "few, if any, local television stations would operate under the per program form of license." That was part of a bargain -- in exchange, the stations obtained, on more than one occasion, reductions in ASCAP's blanket license fee rates.

ASCAP is simply unaware of any "requests by the Antitrust Division of the Department of Justice to modify aspects of the per program license so as to make that license option a more meaningful one." Certainly, as we have noted previously, the per program license is a meaningful option for hundreds of commercial radio stations currently licensed by ASCAP on that basis. And, depending on the outcome of the Buffalo Broadcasting proceeding, it may well be that many television stations will similarly be licensed on a per program basis.

Next, ASCAP's efforts to modify its consent decree so as to relieve it of the obligation to offer a per program license to any television network holding a blanket license from BMI was predicated on ASCAP's belief that ASCAP's members would be placed at a significant competitive disadvantage by that circumstance. Although Judge Conner denied ASCAP the relief we sought, he did so only because in the absence of that license circumstance, he could perceive no actual harm visited upon ASCAP's members. Fortunately for ASCAP's members, the

problem remains a theoretical one, so ASCAP has not yet had occasion to seek again the same relief.

In the wake of Magistrate Judge Dolinger's decision imposing interim per program license arrangements upon ASCAP and the local television stations, ASCAP recognized the enormous cost of administering those arrangements. We urged then that neither ASCAP's members nor the stations ought to bear that expense on an interim basis. The predicted costs were indeed substantial -- in his February 1993 decision, Magistrate Judge Dolinger awarded ASCAP interim administrative costs totaling more than $4.6 million.

ASCAP continues to believe that the per program license is ill-suited to the cable television industry. For example, it is patently impossible to calculate a percentage-of-revenue license fee on programs aired by pay cable services like HBO and The Disney Channel for which the sole source of revenue is subscriber fees for the service.

Conclusion

The TMLC represents some of the most powerful business entities in the United States; collectively, local television stations garner annual revenues in the billions of dollars. The stations surely do not need this Subcommittee to tilt the playing field in their favor, to the undesirable detriment of America's creators, especially when they are pressing their arguments in the courts.

Dated: April 15, 1994

Appendix 7.—Statement of the American Horse Council

Mr. Chairman, the American Horse Council appreciates this opportunity to submit testimony in support of H.R. 3288, which would clarify that the incidental use of copyrighted music and video programming on radios and televisions in commercial establishments that serve food or drink is not subject to licensing fees, provided no charge is made by the establishment for such programming.

The American Horse Council is the national representative for the horse industry. It includes 194 horse related organizations representing over 1 million horse owners and breeders. An important part of our membership are owners of racetracks.

Racing and wagering is conducted in thirty-nine states and in 1992 over 64 million people attended horse races and wagered over $14 billion. The various states received over $725 million from this activity in 1992.

Most of our member race tracks provide food and drink as well as racing. Dining at restaurants while attending the races is a major source of revenue, as well as a major marketing tool for tracks to generate repeat customers. It has become an industry practice over the past several years to provide small television sets for each table in the restaurant. The customers can view the horses warming up on the track, going to the gate and racing, as well as seeing the betting odds on these horses and the amounts being bet in the various pools and ultimately the prices for the winners. Commentary of local handicappers from on-track studios is also part of the on-track program.

We think it fair to say that patrons do not come to the track to listen to background music or watch commercial television. The television sets are clearly in the restaurant as a tool or aid

for the patron in helping the patron enjoy the races.

Despite the obvious purpose for these television sets, some of our member tracks have been approached by the performance societies insisting that blanket licenses be entered into based on the number of television sets at the racetrack.

Passage of the Thomas Bill, H.R. 3288, would clarify the exemption in the existing law and would make clear that incidental use of background music and or video programming in restaurants where there is no charge for the transmission is not compensable. It would also remove the ability of the music performing societies to pressure these businesses over incidental use and help reduce litigation thereby freeing up court time for more substantial matters.

We urge the Subcommittee to vote favorably on H.R. 3288.

March 9, 1994

APPENDIX 8.—LETTER FROM JOHN B. BURCHAM, JR., EXECUTIVE DIRECTOR, NATIONAL ASSOCIATION OF BEVERAGE RETAILERS (NABR), TRANSMITTING A POSITION PAPER BY THE NABR, TO HON. WILLIAM J. HUGHES, MARCH 16, 1994

Red Coleman
President

John B. Burcham, Jr.
Executive Director

March 16, 1994

The Honorable William J. Hughes
Chairman
Subcommittee on Intellectual Property and
Judicial Administration
House Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Please find enclosed a position paper presented by the National Association of Beverage Retailers (NABR). The position paper supports H.R. 3288 which was a subject of discussion at the Oversight Hearing before the Subcommittee on Intellectual Property and Judicial Administration, House Committee on the Judiciary. NABR supports the exemption of music licensing fees for incidental use of radio and television broadcasts in retail hospitality businesses.

I am confident that you will find the paper's content informative and I welcome any comments or questions you may have with regard to this or other issues.

Sincerely,

John B. Burcham, Jr.

John B. Burcham, Jr.
Executive Director

5101 River Road, Suite 108, Bethesda, MD 20816-1508
301-656-1494 ▪ fax 301-656-7539

POSITION PAPER

March 16, 1994

H.R. 3288
"THE PUBLIC ACCOMMODATION EXEMPTION ACT"

Presented by:
The National Association of Beverage Retailers
5101 River Road, Suite 108
Bethesda, MD 20816-1508
(301) 656-1494

The National Association of Beverage Retailers (NABR) is a national association comprised of twenty-five state associations of both on and off-premise alcohol beverage licensees. NABR's off-premise members operate businesses in the "licensed" or "open" states.

NABR is a joining of the two major branches of alcohol beverage retailers into a single unified organization. Through unity, retailers, the industry, consumers and government benefit through open communication, education and the retailers contribution to the economy and community well-being.

THE NATIONAL ASSOCIATION OF BEVERAGE RETAILERS (NABR) SUPPORTS AN EXEMPTION OF PAYMENT OF COPYRIGHT LICENSING FEES TO PERFORMING RIGHTS SOCIETIES FOR THE INCIDENTAL USE OF RADIO AND TELEVISION BROADCASTS IN RETAIL HOSPITALITY ESTABLISHMENTS

Background

Performing rights societies -- ASCAP, BMI and SESAC -- are currently authorized to impose copyright fees on retail hospitality businesses for the incidental use of radio and television broadcasts. Retail hospitality businesses are defined as commercial establishments which serve food or drink and include restaurants, bars, taverns and off-premise retail stores. The collection of copyright fees is now guaranteed under the Copyright Act of 1976.

Position

The National Association of Beverage Retailers (NABR) supports passage of "The Public Accommodation Exemption Act" (H.R. 3288) which would amend the Copyright Act of 1976 to completely exempt retail hospitality businesses from payment of broadcast licensing fees for incidental use of television and radio broadcasts transmitted over the public airwaves.

Solicitation and collection of music licensing fees for incidental broadcasts is an unregulated and often abused practice which should compel Congress to pass H.R. 3288 amending the Copyright Act of 1976.

Reasons

1) Incidental television broadcasts are solely for the benefit of customers and are not intended to generate revenue for the establishment.

2) Retail establishments will continue to pay licensing fees on transmissions for which a direct charge is made to see or hear the performance.

3) Performing rights societies often use unclear and misleading or confusing methods to solicit or collect licensing fees.

4) Current legislation already exempts all broadcasts occurring on "residential-style" radio and television equipment, much of which is commonly found within retail hospitality establishments. Changing technology has broadened the availability of residential-style radios and televisions to the commercial marketplace, including retail hospitality businesses.

5) The measurements of viewing screens and loudspeaker systems have increased making "theater-style" equipment common and accessible to private residences. Therefore, the definition of "residential-style" radios and television must change. Commercial establishments with similar residential-style equipment are subject to licensing fees without consideration of changing technology.

6) Broadcast license agreements already exist and are paid by television and radio broadcasters, resulting in double payment to the performing rights societies for the same performance.

APPENDIX 9.—SERIES OF STATEMENTS FOR THE RECORD (22) FROM NUMEROUS ORGANIZATIONS AND INDIVIDUALS REGARDING THE ACTIVITIES OF THE PERFORMING RIGHTS SOCIETIES

May 23, 1994

Honorable Representative William J. Hughes
Chairman
House Subcommittee on Intellectual
Property & Judicial Administration
207 Cannon House Office Building
Washington, DC 20515

Re: Statement For the Record for The Hearing of February 23-24, 1995 on Music Licensing, BMI, ASCAP

Dear Representative Hughes:

I am writing on behalf of the Oregon Bluegrass Association, a non-profit organization formed in 1982. The OBA is concerned about the practices of songwriting licensing organizations like ASCAP and BMI and how these practices affect those of us who promote and perform bluegrass music. We request Congress make a full scale investigation of all music licensing organizations.

As our Bylaws state, the OBA's purpose is "to promote, encourage, foster and cultivate the preservation, appreciation, understanding, enjoyment, support and performance of bluegrass and other closely related music." We do this through an outdoor music festival and a week-long instructional camp in the summer, a gospel concert in the winter, and monthly concerts and jam sessions. We are staffed entirely by volunteers; membership is currently at about 450. Regional musicians make up the majority of those performing at OBA-sponsored events, many of whom perform original or traditional material.

Bluegrass music is far from main-stream entertainment; therefore, the slice of the licensing pie impacted by bluegrass is negligible, to say the least. ASCAP tracks only selected major commercial radio stations and television to "guess" how many times an artist gets played and bases a composer's percentage of the pie on these figures. Unfortunately, bluegrass composers are compensated based on data gathered from main-stream sources. We believe, therefore, that songwriting licensing organizations such as ASCAP and BMI are asking those who promote and perform bluegrass to pay licensing fees that are disproportionate to the funds coming back to the bluegrass songwriters.

For example, as a programmer for a local community-sponsored radio station, I know the bluegrass music I choose to play on the air is not tracked by ASCAP or BMI. The radio station

pays flat licensing fees to be on the air. I once asked a nationally known bluegrass performer to what extent she receives compensation for her music that might make it to the airwaves. She said she receives something less than a dollar every three or four months.

We understand ASCAP has recently been targeting jam sessions which are nothing more than folks getting together to play music for personal enjoyment. Jam sessions are traditionally free of charge and will spring up spontaneously almost anywhere two or more musicians gather together. We don't believe ASCAP or BMI has any authority over people who chose to learn and play an artist's work for personal enjoyment.

Thank you for your time and consideration.

Sincerely,

Dee Ann Davidshofer

Dee Ann Davidshofer
President

May 24, 1994

Honorable Representative William J. Hughes,
Chairman, House Subcommittee on Intellectual Property and Judicial Administration
207 Cannon House Office Building,
Washington, DC 20515

STATEMENT FOR THE RECORD FOR THE HEARING OF FEBRUARY 23, 24, 1995 ON MUSIC LICENSING, BMI, ASCAP

Dear Representative Hughes,

On behalf of the Crossroads Shopping Center and Public Market in Bellevue, Washington, I would like you to know how unhappy we are with ASCAP/BMI and shopping centers as entertainment venues and the exploitation of lesser known musicians by not giving them equal opportunity to participate in their distribution of license monies.

Crossroads is a 407,000 sq/ft. community shopping center and has become a popular 'living room' for the neighborhood One of the factors that contributes enormously to our success is that for the past three years we have presented 'Late Night in the Market', FREE live music concerts every Friday and Saturday nights featuring a large variety of local musicians. The owner of the Shopping Center has donated a very leasable space which we have coverted into the MarketStage with state-of -the-art sound equipment. Every performance is handled by a professional sound technician. We pay the musicians who perform here. We have seating for about 200 people. We hear very positive comments all the time from musicians and audiences about the quality of performers and broad range of music we present, from jazz to folk to big band to blues and ethnic groups. National Public Radio "Marketplace" did a story about Crossroads and our unique program in March of this year.

This 'Late Night' program costs the Merchant's Association ***over 1/3rd of our annual budget to operate.*** Customers benefit by being exposed to a broad range of high quality live music where children are welcome in a wholesome smoke-free, alcohol-free venue. The musicians benefit by having a place where they can ***perform their music and get paid as well***. The merchants benefit by increased traffic and community recognition; the actual concerts do not generate income because they are free to the public. *Customers do buy more food during concerts, but the whole Crossroads Merchants Association foots the bill for performers, sound technicians AND ASCAP BMI. and the food venues are only 20% of the tenant mix at Crossroads. .*

Terranomics Crossroads Associates
15600 N.E. 8th Street, F-13
Bellevue, WA 98008-3917
(206) 644-1111

We have a policy of hiring groups and individuals who primarily perform their own compositions These singer-songwriters are not receiving the benefits of ASCAP/BMI payments. Noone monitors their songlists. And yet, Crossroads Merchants Association pays over $3,000 annually to ASCAP and BMI for live music performances. Many of these performances are by local school groups during the Holidays. We have recently started a third night of music called Open Mike Night where upcoming and established acoustic musicians share their music with other musicians and non-musicians. This is also a free program and the music is almost entirely original, non-licensed music.

I would ask that you launch a full scale congressional investigation of all the music licensing organizations immediately. The systems favors the successful artists and has questionable benefit to the musicians who perform on my stage. The pricing structure doesn't make sense as it is based on square footage for the shopping center, not the audience or dollars generated or any other criteria that is comprehensible to my Board of Directors.

Thank you for your consideration.

Sincerely,

Lynn Terpstra

Lynn Terpstra
Regional Marketing Director, Terranomics

cc. Representative Jennifer Dunn
Senator Patty Murray
Senator Slade Gorton

May 24, 1994

Honorable Representative William J. Hughes
Chairman, House Subcommittee on Intellectual Property and Judicial Administration
207 Cannon House Office Building
Washington DC 20515

"Statement For the Record for The Hearing of February 23, 24, 1994 on Music Licensing, BMI, ASCAP

Dear Representative Hughes:

I am writing to complain against ASCAP on a matter of interference with my business association with the MHRV Show Assn.

The MHRV Association used to employ me and a partner as a duo, three times a year for a total of $3000.00 . A musician's profession resembles that of a salesman - one earns income based on how many clients one can serve. Playing music is our BUSINESS - which means we have a college education in the profession, we are licensed to do business, we pay taxes, we advertise in the phone books, over the past 22 years we have built a clientele that uses our services multiple times - We provide music not only for the COMMERCIAL community, but also for the public that wants to hear "live" music in the form of public concerts, park concerts, jazz festivals etc.

A professional musician's occupation is different in several respects from other businesses. We are constantly in competition with avocational musicians who are moonlighting and who will either play for nothing, "for the fun of it", or for token pay. There is no license required and no qualification requirements. There is a general public misconception that musicians like to play for the "exposure" or that we tend to indulge in dope and/or other odious practices. There are booking agents, convention planners etc. who all take their bite out of the music hiring public. We work hard at trying to convince the public that ours is truly a "real" profession and our approach is the same as any business - We keep and have repeat customers based on our good service and professional business practices. Competition is prevalent in all forms of business, however ASCAP is not competition - ASCAP is actually **INTERFERING** with the musicians' ability to work and do business with the musicians' **OWN CUSTOMERS!**

ASCAP contacted the MHRV SHOW ASSN and required them to pay ASCAP more money than we as musicians were receiving. Our FORMER MHRV employer was angry at ASCAP's methods, and he initiated a lawsuit in the working musician's behalf, but ASCAP is so powerful, no one can have any hope of fighting the immense power they have in the music performance industry. The end result in this particular instance is that there is a $1500 annual reduction for each of us in our income potential - a loss caused by the organization that is supposed to SUPPORT and PROTECT the musicians.

We urge you to investigate ASCAP's business practices - their excessive overhead in the form of executive salaries which ultimately cuts into the artist's residuals and their use of power and intimidation against today's working musicians and their clients. .. I am sure that Don Culver and Les Fitzpatrick (MHRV Show 1-776-8108) will be immensely relieved to receive some support from your office. They have spent a significant chunk of money in our behalf in a lawsuit against ASCAP - they are fighting alone and I suspect a losing battle. Please help us.

Sincerely,

Rose Marie Barr - Musician

CC: MHRV Show Assn.; Honorable Representative, Carlos Moorehead;
Senator Slade Gorton; Senator Patty Murray; U.S. Representatives Marie Cantwell and Jennifer Dunn; Victory Music; Olympia Jazz Festival

THE PINECASTLE/WEBCO RECORDING GROUP

May 25, 1994

The Honorable William J. Hughes
Chairman, House Subcommittee on Intelletual
Property and Judicial Administration
207 Cannon House Office Building
Washington DC 20515

Re: Statement For the Record for The Hearing of February 23, 24, 1995
on Music Licensing, BMI, ASCAP

Dear Congressman Hughes,

It is my understanding that various committees of House and Senate are holding hearings regarding music licensing. By authority of Congress, three organizations hold a monopoly on the collection and distribution of various musical performance rights. These organizations are BMI, ASCAP and SESAC.

These organizations have failed miserably in providing a system to equitably compensate the writers and publishers of the United States. This statement is particularly true as it applies to the writers and publishers of non-mainstream music.

I am sure your staff can provide you with reviews of their business practices but the essence of their systems is that monies collected from all venues are distributed on the basis of radio play. Even if that system were equitable, the manner in which it is managed by these organizations is archaic, for the most part, they are not even making use of technological improvements for surveying radio play that is available to them.

I am a publisher, show promoter and radio personality in the field of acoustic country music (sometimes called bluegrass) so my experience is first hand. I would like to share some experiences with you.

IBMA International Bluegrass Music Association MEMBER

5108 S. Orange Ave. • Orlando, FL 32809 • 407/856-0245 • FAX 407/858-0007 Member of NAIRD

My publishing company personally has music published by various writers which gets extensive airplay through my own syndicated radio program and a number of other syndicated programs as well as local radio airplay. These reports of airplay are not completely an exact science, yet based on lack of compensation from BMI, our licensing agency, there is apparently no airplay. While I understand there could be discrepancies, 0 airplay is not a possibility and reflects the inadequacies of their system.

Another example of the unfairness of the current system is the fact that we are required by BMI and ASCAP and sometimes SESAC to pay licensing fees for our various shows. At these shows the artist primarily sing their own compositions which are copyrighted and published. certainly this qualifies as public performance yet because of more limited airplay the basis for payment by the licensing agencies many artist never receive any compensation because they have limited airplay.

I realize this is a difficult and complex subject but it is clear that the current system and the current mandate given these agencies was designed for a simpler and earlier age when radio stations nationwide numbered in the hundreds instead of the thousands. Although there is question in my mind that the system was ever equitable, in todays world it is not capable of justly recognizing writers and publishers for their creative efforts.

Thank you for your consideration of my opinions.

Sincerely,

TW

Thomas W. Riggs
President
PINECASTLE PUBLISHING CO., INC.

Leonard Ellis
3466 Wade Street
Los Angeles, CA 90066
(310) 391-1664

May 26, 1994

Honorable Representative William J. Hughes
Chairman, House Subcommittee on
Intellectual Property and Judicial Administration
207 Cannon House Office Building
Washington, DC 20515

Statement For the Record for The Hearing of February 23,24 1995 on Music Licensing, BMI, ASCAP.

Dear Congressman Hughes:

As a composer affiliated with BMI I have never received any money for broadcast of my music on radio stations. I am enclosing copies of evidence of radio station airplay of my music. These stations are paying licensing fees to BMI to play my music but the money is not going to me. Something must be done about this unfair situation. When I sent this evidence to BMI they said nothing could be done, if my music wasn't played on the stations that they tracked I wouldn't get any royalties no matter how many playlists I sent them. They claim their system is fair. I think it is outrageous. Taking money from the little guys to further boost the earnings of the big guys is insane. If anything the system should be slanted toward the little guy, the small independent composer who is struggling to make a living. BMI continues to support this unfair system because they know that I and other composers in the same situation don't have the financial resources to fight them in court. Unless Congress compels them to change it is going to be the same old song.

Sincerely,

Leonard Ellis

April 6th, 1987

Dear Leonard,

Thank you for sending me a copy of your album "Starlight Sonata". I'm always looking for new material to play on the Folk Sampler and I've enjoyed listening to your music.

The Folk Sampler is an hour long program of folk, traditiona bluegrass and blues that is aired on public radio stations all around the country. It is distributed by satellite by the American Public Radio Network in St. Paul. Hope you're able to tune it in sometime.

Sincerely, Mike

Mike Flynn

Dear Leonard:

I love your album, *Starlight Sonata*, and I have checked off the selections I will be playing on my station.

Sincerely, Ivan Rinehouse

Signature

Side One	Side Two
☐ Starlight Sonata	☐ Quinn Elizabeth
☐ Backlot	☐ Walking Tune
☐ River of Love	☐ Thanksgiving Waltz
☐ Schottis #2	☒ Pumpkins in the Spring
☐ Backhome Waltz	☐ Skandia Waltz
☒ Kim	☐ Countdown Jig
☐ Christmas Waltz	☐ Circle of Dreams

KRRM PLAYLIST—MAY 1987

HVY			
Koko Taylor	Alligator	Hazel Dickens	Rounder
Boure Kunde	Celluloid	Alex Moore	Arhoolie
Jasmine	Icebergg	Steve Kindler/Teja Bell	Glob. Pacif
Hobuko Miyamoto	Ayyubi/Great Leap	Neville Brothers	EMI Americ
The Ravens	Savoy	Dwight Yoakam	Reprise
David Sylvian	Virgin	Brave Combo	Rounder
Moving Hearts	Green Linnet	Eddy Clearwater	Booster Bl
		Ralph Stanley	Rabel
MEDIUM			
Lenny Pickett/Borneo Horns	Carthage	Firehose	SST
Wendy Waldman	Cypress	Denny Freeman	Amazing
Alix Dobkin & Friends	Women's Wax Works	Irene Cara	Elektra
David Bowie	EMI America	McCoury Brothers	Rounder
Amadé Ardoin	Old Timey	The Weathermen	Play It Sa
Milt Jackson	Pablo	Keiko Matsui	Passport J
The Mylons	Open Air	Edgar Meyer	MCA
242	Wax Trax	Doc Roberts	County
[illegible]hase Grappelli	GRP	Buddy Montgomery	Landmark
[illegible]ien Hamface	Folklyric	W.C. Clark Blues Revue	Drippin'
Gayle Marie	Gaylea Music	Ladysmith Black Mambazo	Warner Bro
Robert Hollis/Christopher Swartz	Perimeter	Fastfolk Mus. Magazine	Fastfolk
The Smiths	Sire	Dutch Concert Rostrum	E. Nederla
Jack Nicholson/Bobbie McFerrin	Windham Hill	Azymuth	Milestone
Miles Davis	Columbia	Duke Ellington	Columbia
Fonty Bone/Squeezetones	Amazing	Jimmy Forrest	Delmark
Bill Monroe	MCA	Bill Bruford	Editions
NoMeansNo	Alt. Tentacles	Erasure	Sire
Meat Puppets	SST	Arthur Russell	Upside
Mark Knobel/Mike Gerber	Highland	Elizabeth Cotten	Arhoolie
Grupo Star	Combo(Rico)	Suzanne Vega	A & M
Innovative Communication	Innovative Communication	Nev Air	Black Sain
Holly Near	Redwood	Winter/Halley	Living Mus
Eternal Wind	Flying Fish	John Adams	Elektra
Bob Moses	Cramavision	Made In U.S.A.	Chrysalis
Robin Hitchcock	Relativity/Glass Fish	Albertina Walker	Rejoice
Carmaig De Forest	Good Foot	Count Basie	Pablo
Kirk Lightsey Quartet	Sunnyside	Leonard Ellis	Leonard Ell
Canadian Brass	CBS	Sly & Robbie	Island
Les Brown	Fantasy	Sumi Tonooka	Radiant
Mad Parade	Better Youth Org.	Phil Manzanera	E.C.
Triume	Origin	Daan Stafan	Rubber Tre
Anthony Braxton	Black Saint	Art Davis Quartet	Soul Note
Tommy Flanagan	Enja	Billy Higgins	Contempora
[illegible]'vio Rodriguez	Paredon	Andrew Calhoun	Flying Fis
[illegible]ibate Rifles	What Goes On	David Friesen	Glob. Paci
James Carr	Bluesside	Scruffy The Cat	Relativity
Carlos Y Jose	Freddie	Wendy O. Williams	Profile
Gece Clark/Carla Olson	Rhino	Joshua Breakstone Quintet	Fantasy
		Patrick de Vietri	Teresia

NEW

RAP

Tommy Boy
Island
Body Rock
Tommy Boy
Public
Profile
Island
Jumpstreet
Formula 1
Elektra
Elektra
Profile
Zakia
Body Rock
TC
NY Groove
Sutra
Body Rock
Body Rock
A&M
Amherst
Profile
Tommy Boy
Priority
Urban Rock
Profile
Jango
Fantasy
Macola
Virgin
Ichiban
Techno Hop
Luke Skywalker
Def Jam
Tommy Boy
T-Part
Profile
4th & B'way
4th & B'way
Profile
Luke Skywalker
Macola
Blue Chip
Fantasy
Ichiban
Tommy Boy
4th & B'way
Sire
4th & B'way
Profile
Fantasy
Nova
Ichiban

REGGAE

Bunny Wailer
Bits Marley
General Trees
Junior Murvin
Ras
Junior Delgado
Disidenten
Teal Connection
Michael Prophet
Black Uhuru
Yellowman
Al Campbell
Jr. Brammer
Dance Hall Session
UB 40
Peter Tosh
U Ray
Judy Mowatt
Killer Bees

Boatsman Skanking
Earth Rumblings
Gone To Negril
Apartheid
Soundwaves
Ragamuffin Year
Life at the Pyramids
Live in London
Settle Ya Fe Settle
Conquer The Tenter 12"
Follow Like Cheese
Fence Too Tall
Hold Your Corner
Anthology
CCCP Live in Moscow
No Nuclear War
Music Addict
Love Is Overdue
Grenada

Shanachie
Shanachie
Shanachie
Greensleeves
Zebra
Mango
Shanachie
Mango
A&M
Ras
Ras
Live & Learn
Live & Learn
Studio One
A&M
Island
Ras
Shanachie
Bootleg/Jungle

WORLD FOLK

Rene Vesamcalas
Music to Trust
Moving Hearts
Sylvia Woods
Relativity
Maloney/O'Connell/Keane/
Jerry O'Sullivan

Bush Dance
Anthology
Live Hearts
The Harp of Brendlsshiere
Gathering Peace
Gilbelly
The Invasion

Antilles
Temple
Green Linnet
Tormeister
Green Linnet
Green Linnet
Green Linnet

NEW MUSIC

John Higgins
Red Rothenberg
Daniel Schell & Rare
Elliot Sharp
Hollis/Swarts
John Zorn
Jandek
Borbetomagus
Anschluss
Univers Zero
Dr. Nerve
Dutch Carillion Music
The Minneapolis Artists' Ensemble
Tenko
Tom Waits

CLASSICAL

All the Truth at Once
Trespass
If Windows They Have
Fractal
Music for Homebuilt Instruments
Cobra
Modern Dances
NY Performances
The Mobile Plumb Bob
Heatwave
Armed Observation
Gradual Disappearance
Franks wild tears

RARecords
Lumina/MMOS
Crammed Discs
Dossier
Perimeter
Hat Hut
Corwood
Agaric
Swill Radio
Cuneiform
Cuneiform
Radio Netherland
FM Composers Forum
REC REC
Island

NEW AGE

David Friesen
Paul Grasmer
The Fruits Of Our Labor
Steve Kindler
Paul Horn
and no play other folks' music too:
Tim Timmermans
Tim Berne
Richard Gilwitz
Radhika Miller
Preston Reed
Peter Kater
Radiance
Kim Robertson
Montrose
Andrew White
Good Feelings Sampler
Whales Alive
Vital Information
Second Nature
Serge Blenner
Acoustic Alchemy
John Jarvis
Richard Southern
Lanz / Speer
Friedmann
A.R. Mathieu
Wall Mathews
Schönherr & Scott

Robert Newcomb
David Cooper
Dieter Schütz
Sonic Atmospheres
Michael Stearns
James Durst
Tingstad/ Rumbel/ Lanz
Jones/ Darling
William Ellwood
Bob Kindler
Georgia Kelly
Michael Stearns
Michael Hoenig

Inner Voices
Joy
Anthology
Dolphin Smiles
Traveler
Pagan of the 6 Mountains
Fulton Street
Somewhere in Between
Sunlit Reverie
The Road less travelled
Coming Home
Inverness
Nana Dia
Sign Language
Conversations

Global Beat
Natural Selection
La Dimension Prochaine

Something Constructive
Innervision
Natural States
Indian Summer
Avail able Light
Riding Horses
One Night in Vienna

Dreams on Queue
Another Kind of Sky
Voyage
Anthology
Plunge
Plagiarp Citizen
Woodlands
Amber
Renaissance
Waters of Life
Stopeace
Floating Whispers
Dept One

Global Pacific
Global Pacific
Global Pacific
Global Pacific
Global Pacific

Chameleon
Columbia
Motherbeacher
BMM
Flying Fish
EAI
Invincible
Invincible
Windham Hill
Sona Rela
Mu Psych
Living Music
CBS
Hummingbird

Lifestyle
MCA
MCA
Meadowlark
Narada Equinox
Narada Equinox
Windham Hill
Clean Cuts
Windham Hill

Arsyn/MMOS
Hummingbird
Life Style
Sonic Atmospheres
Sonic Atmospheres
Phoenix Song
Narada
Narada
Narada
Global Pacific
Global Pacific
Sonic Atmospheres
Capitol

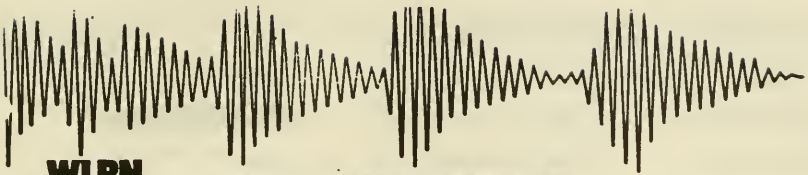
COMMUNITY RADIO
KAOS
89.3 fm Olympia Wa

Listener Sponsored Community Radio Olympia, Washington 98505 Telephone 866/866-5427

Dear Leonard:

Thank you for sending
your "Starlight Sonata" LP.
It's receiving airplay + much appreciated.
We'll send a playlist this summer—
sorry it took me so long to respond!

Kiki Pope
KAOS music director



WLRN

Winter '87 Playlist "Folk & Acoustic Music" Cont.
Host: Michael Stock

Green Linnet	Sileas	Delighted with Harps
Green Linnet	A.Stewart & M.Lunny	Dublin Lady
Green Linnet	Tannahill Weavers	Dancing Feet
Greenhays	Bluestein Family	WhereDoes Love ComeFrom
Hacker Backer	Richard Gilewitz	Somewhere in Between
Hogeye	Cindy Mangsen	Longtime Traveling
Icebergg	Jasmine	Wild Strings
Kerrville	Collection	Folk Festival '77'78'79...
Kicking Mule	Doug Berch	The Longing
Kicking Mule	Horse Sense	Hills of Mexico
LEP	Leonard Ellis	Starlight Sonata
MCA	Acoustic Alchemy	Red Dust & Spanish Lace
McDisk	Rod MacDonald	White Buffalo
Machine Head	Wind Machine	Unplugged
Meadowlark	Baby Watson Brothers	Swing Street
Midoaks	Doug Mishkin	Woody's Children
New Clear	Mark Levy	Take Off Your Clothes
Old Homestead	Bluegrass Generation	Bluegrass Generation
Osceola	Jim Ballew	Roll on Manatee
Outer Green	Schooner Fare	The First Ten Years/Alive
Outer Green	Schooner Fare	Day Clipper/We The People
Philo	Christine Lavin	Another Woman's Man
Philo	Magpie	If It Aint' Love
Philo	Jean Redpath	A Fine Song for Singing
Relix	Savoy Brown	Slow Train
Rebel	Bill Harrell	Blue Virginia Blue
Rebel	Larry Rice	Time Machine
Rebel	Larry Sparks	Gonna be Movin'
Rebel	Ralpn Stanley	Lonesome & Blue
Rebel	Virginia Boys	Hard Time & Headaches
Reckless	Edward Gerhard	Night Birds
Reckless	Cormac McCarthy	Cormac McCarthy
Red House	B.Hinkley & J.Larson	Out In Our Meadow
Red House	Mustards Retreat	Midwinter's Night
Red House	Claudia Schmidt	Big Earful
Red Pajamas	Steve Goodman	Unfinished Buisness
Release	Irish Brigade	Raised on Songs and Stories
Rock in Crock	Stone Soup	October night
Roheen	Kity Donohoe	Farmer in Florida
Rose Quartz	Odetta	Movin' It On
Rounder	Chicken Chokers	Shoot Your Radio
Rounder	N.Blake & T.Rice	Blake & Rice

Public Radio. 91.3 • Public Television, TV-17 • Instructional Television • Cable Access Television • Radio Reading Service • Friends of WLRN
Broadcast Services of the Dade County Public Schools, 172 N.E. 15th Street, Miami, Florida 33132 (305) 376-1717

ARTIST	TITLE	LABEL
MICHAEL W. GILBERT	Sundiata	Cibex rec.
LEONARD ELLIS	Starlight sonata	[redacted]
PIERO MILESI	The procession	Cuneiform rec.
SOLIMAN GAMIL	The new nubia	Touch
MUSLIMGAUZE	Bour-el-barajneh	Limited edition rec.
IRAK NATIONAL TROUPE		Bhagdadiyath
BOROFSKY/TOMNEY	Radical songbirds vol. 1	ROIR
C-CAT TRANCE	Dalbouka	Ink rec
THE BARBARIAN LOVERS	Dancing in slow motion	
RUBY BLUE	Because	Ink rec.
TINY LIGHTS	Painted skies	Topy rec.
LYS ASSIA	Akvarell 4	
6TH COMM/FREYA ASWYNN	The fruits of yggdrasil	Dyne radia
DEROME/LUISSIER	Sur la mort	Irek rec.
THE COURAGE OF LASSIE	Iron	Irek rec.
DENNIS ANDREWS	China passage	Dry & nite prod.
RUBY BLUE	Bless You	Ink rec.
JALI MOUSSA JAWARA	Fote mogoban	Oval records
DEMIS ROUSSES	My only fascination	Phillips

Dear Leonard:

I love your album, *Starlight Sonata*, and I have checked off the selections I will be playing on my station.

Sincerely,

Signature

Side One

- ☒ Starlight Sonata
- ☐ Backlot
- ☐ River of Love
- ☐ Schottis #2
- ☐ Backhome Waltz
- ☐ Kim
- ☐ Christmas Waltz

Side Two

- ☐ Quinn Elizabeth
- ☐ Walking Tune
- ☐ Thanksgiving Waltz
- ☐ Pumpkins in the Spring
- ☐ Skandia Waltz
- ☐ Countdown Jig
- ☐ Circle of Dreams

wdet FM 101.9
6001 CASS AVENUE • DETROIT, MICHIGAN 48202 • (313) 577-4146

February 16, 1989

Leonard Ellis
P.O. Box 66002
Los Angeles, CA 90066

Dear Leonard:

Just wanted to say thanks again for the copy of Starlight Sonata — it's a BEAUTIFUL album, and our listeners are certainly enjoying it (me, too!).

It was a real pleasure meeting and talking with you at the NAFMA conference, and I look forward to seeing you sometime again soon.

Judy

Judy Dyki

I love your album, *Starlight Sonata*, and I have checked off the selections I will be playing on my station.

Sincerely,

Jim Bell, New Age Music & Radio

Signature

Side One	Side Two
● Starlight Sonata	● Quinn Elizabeth
☐ Backlot	☐ Walking Tune
☐ River of Love	☐ Thanksgiving Waltz
☐ Schottis #2	☐ Pumpkins in the Spring
☐ Backhome Waltz	☐ Skandia Waltz
● Kim	☐ Countdown Jig
☐ Christmas Waltz	● Circle of Dreams

July 2

Dear Leonard,

Thank you for Circle of Dreams and the Bear Benind cassette (which had already had some airplay). I think you have a wonderful talent, and for me at least you really stand out from the legion of piano soloists who have emerged since George Winston achieved popularity. You can contact CALIFORNIA RECORD DISTRIBUTORS, INC. at 6011 S. Roxbury St., Seattle, Wash. 98118-5944. If you're ever passing this way and would like to have a little concert here, be sure to contact me through the station. Best of luck with your music.

Joseph

4/7/87

Dear Leonard: I congratulate you and your arranger on what I think is a really remarkable album. It reminds me of Michael Bell and the Playford Players -- I wonder if you are familiar with those recordings of 17th century English country dance tunes... Your tunes are wonderful, arrangements likewise; this whole album is going to get a lot of airplay on KMUN. Do say hello if you ever pass this way.

I love your album, *Starlight Sonata*, and I have checked off the selections I will be playing on my station.

Sincerely,

Signature

Side One	Side Two
☐ Starlight Sonata	☐ Quinn Elizabeth
☐ Backlot	☐ Walking Tune
☐ River of Love	☐ Thanksgiving Waltz
☐ Schottis #2	☐ Pumpkins in the Spring
☐ Backhome Waltz	☐ Skandia Waltz
☐ Kim	☐ Countdown Jig
☐ Christmas Waltz	☐ Circle of Dreams

My favorite album of the year so far.

Joseph Stevenson

Joseph Stevenson - Program Dir.

MAY, 1988 WHKW-FM/POWER 98 MYSTIC DREAMS PLAYLIST

HEAVY

MANNHEIM STEAMROLLER-VARIOUS
JAN HAMMER-ESCAPE FROM TELEVISION
•CUSCO-APURIMAC
WISHBONE ASH-NOUVEAU CALLS
•EXCHANGE-INTO THE NIGHT
LATTITUDE-40 NORTH
CRAIG HUXLEY-VARIOUS

MEDIUM

MICHAEL STEARNS-PLANETARY UNFOLDING
FILM & THE BBs-NEON
•JEAN MICHEL JARRE-THE ESSENTIAL J.M. JARRE
•GEOFFREY DOWNES & THE NEW DANCE ORCHESTRA-THE LIGHT PROGRAM
STEWART COPELAND-THE EQUALIZER & OTHER CLIFF HANGERS
ACOUSTIC ALCHEMY-NATURAL ELEMENTS
JON GOIN-WALTZ AT BIG SKY
GILES REAVES-NOTHING IS LOST
PETE HAYCOCK-GUITAR & SON

LIGHT

•KITARO-VARIOUS
LANTZ & SPEER-VARIOUS
RIPPINGTONS-KILIMANJARO
•BRIAN SLAWSON-DISTANT DRUMS
•SUZANNE CIANI-NEVERLAND
•TANGERINE DREAM-VARIOUS
•SYNERGY-VARIOUS
RAY LYNCH-DEEP BREAKFAST
RICHARD DEL MAESTRO-LANGUAGE OF THE HEART
BRUCE BECVAR-TAKE IT TO HEART
KENNETH NASH-VARIOUS

ALSO PLAYING

RIC SWANSON	•PETER SEILER	BOB KINDLER
•YELLO	•ART OF NOISE	LEONARD ELLIS
STEVE ROACH	HERBIE MANN	MAX HIGHSTEIN
DON HARRIS	•AMIN BHATIA	ROBERT SHROEDER(foreign label)
BEN TAVERA KING	GARY HUGHES	•PATRICK MORAZ
•INTERIOR DESIGN	DEUTER	KARL SHRAFFNER

MAILING ADDRESS: WHKW(POWER 98)
c/o MIKE ADAMS
#1 CARROLLTON STREET
P.O. BOX 97
KENNEDY, ALABAMA 35574
(205) 932-6761

•NEED COMPACT DISC! OTHERWISE, ANY OTHER ARTISTS NOT MENTIONED, PLEASE SEND CD'S!

Dear Leonard

I love your album, *Starlight Sonata*, and I have checked off the selections I will be playing on my station.

Sincerely,

Signature

Side One	Side Two
☒ Starlight Sonata	☐ Quinn Elizabeth
☐ Backlot	☒ Walking Tune
☒ River of Love	☐ Thanksgiving Waltz
☒ Schottis #2	☐ Pumpkins in the Spring
☒ Backhome Waltz	☒ Skandia Waltz
☒ Kim	☐ Countdown Jig
☐ Christmas Waltz	☐ Circle of Dreams

Dear Leonard:

I love your album, *Starlight Sonata*, and I have checked off the selections I will be playing on my station.

Sincerely,

James Goldsmith (James Goldurs)

Signature

Side One	Side Two
☐ Starlight Sonata	☐ Quinn Elizabeth
☒ Backlot	☐ Walking Tune
☐ River of Love	☒ Thanksgiving Waltz
☐ Schottis #2	☒ Pumpkins in the Spring
☐ Backhome Waltz	☐ Skandia Waltz
☒ Kim	☐ Countdown Jig
☒ Christmas Waltz	☒ Circle of Dreams

Dear Leonard:

I love your album, *Starlight Sonata*, and I have checked off the selections I will be playing on my station.

Sincerely,

Signature

ALL OF IT!

Many thanks for

Side One	Side Two
☐ Starlight Sonata	☐ Quinn Elizabeth
☐ Backlot	☐ Walking Tune
☐ River of Love	☐ Thanksgiving Waltz
☐ Schottis #2	☐ Pumpkins in the Spring
☐ Backhome Waltz	☐ Skandia Waltz
☐ Kim	☐ Countdown Jig
☐ Christmas Waltz	☐ Circle of Dreams

JOHN CARROLL UNIVERSITY
UNIVERSITY HEIGHTS, OHIO 44118
(216) 397-4437

WUJC 88.7 FM
JOHN CARROLL UNIVERSITY RADIO

ATMOSPHERES PLAYLIST - ADDS 4/15/87

ARTIST	TITLE	LABEL
SteveKindler/Teja Bell	Dolphin Smiles	Global Pacific
Patrick O'Hearn	Between Two Worlds	Private
Timmermans/Wise	Poems of the Five Mountains	Innovative Communication
Dieter Schutz	Voyage	Lifestyle
Various	Good Feelings	Mu-Psych
Kimbal Dykes	Classical Guitar	Elan
Andrew White	Conversations	Sona Gaia
Danny Heines	Aqua Touch	Silver Wave
Paul Horn	Traveller	Global Pacific
Mic Holwin	Starting to Remember	Lifestyle
Ian Tescee	Continua	Starsong
Paul Greaver	Joy	Global Pacific
Ravi Shankar	Tanatana	Private
Richard Souther	Innermission	Meadowlark
Baffo Banfi	Hearth	Innovative Communication
Leonard Ellis	Starlight Sonata	Leonard Ellis Productions
David Van Tieghem	Safety In Numbers	Private
Eternal Wind	Terra Incognita	Flying Fish
Justo Almario	Plumbline	Meadowlark
Serge Blenner	La Dimension prochaine	Lifestyle
Jerry Read Smith	Heartdance	Song of the Wood

20th Century/Avant-Garde/Experimental

David Torn	Cloud About Mercury	ECM
Various	A La Carte	Minnesota Composers Forum
John Zorn	Big Gundown	Icon/Nonesuch
Steve Reich	Six Marimbas	Nonesuch
Dome	Dome	Uniton
Zeitgeist	Zephyr	Time Ghost
Phillip Glass	Glassdances	CBS/FM
John Adams	The Chairman Dances	Nonesuch
Dark	Dark	CIP
Piero Milesi	Nuclear Observatory of Mr. Nanof	Cuneiform
Walter Holland	Relativity	Coriolis
Christopher Rouse	Infernal Machine	Nonesuch
Margaret Leng-Tan	Litania	New Albion
Alvin Curran	Era Ora	New Albion
Teresa Stratas	Sings Weill	Nonesuch
Kronos Quartet	Sculthorpe...Hendrix	Nonesuch
John Cage	Freeman Etudes I-XVI	Lovely
Balanchine Album	NYC Ballet.	Nonesuch
FS	Illustrative Problems	Cuneiform

Dear Leonard:

~~I~~love your album, *Starlight Sonata*, and I have checked off the selections I will be playing on my station.

Sincerely, Ryth. Tuck Kit

Signature

Side One	Side Two
☐ Starlight Sonata	☐ Quinn Elizabeth
☒ Backlot	☐ Walking Tune
☐ River of Love	☐ Thanksgiving Waltz
☒ Schottis #2	☒ Pumpkins in the Spring
☐ Backhome Waltz	☐ Skandia Waltz
☐ Kim	☒ Countdown Jig
☐ Christmas Waltz	☐ Circle of Dreams

Dear Leonard: Thanks for sending it!!

I love your album, *Starlight Sonata*, and I have checked off the selections I will be playing on my station. You'll receive our believe our DJ's playlists, too.

Sincerely, Simon Frech Please send a catalog.

Signature

Side One	Side Two
☐ Starlight Sonata	☐ Quinn Elizabeth
☐ Backlot	☐ Walking Tune
☐ River of Love	☐ Thanksgiving Waltz
☐ Schottis #2	☐ Pumpkins in the Spring
☐ Backhome Waltz	☐ Skandia Waltz
☐ Kim	☐ Countdown Jig
☐ Christmas Waltz	☐ Circle of Dreams

Dear Leonard:

I love your album, *Starlight Sonata*, and I have checked off the selections I will be playing on my station.

Sincerely, Very very nice work

Signature MUSIC OF THE SPHERES

Side One	Side Two
☒ Starlight Sonata	☒ Quinn Elizabeth
☐ Backlot	☐ Walking Tune
☐ River of Love	☐ Thanksgiving Waltz
☐ Schottis #2	☐ Pumpkins in the Spring
☒ Backhome Waltz	☐ Skandia Waltz
☐ Kim	☒ Countdown Jig
☐ Christmas Waltz	☐ Circle of Dreams

esp nice: we played it all!

Please let us have any new music coming out.

keep in touch

I love your album, *Starlight Sonata*, and I have checked off the selections I will be playing on my station.

Sincerely,

Dawn L Vagenpat

Signature

KPFA FM 94.1 Berkeley CA

Side One	Side Two
☒ Starlight Sonata	☐ Quinn Elizabeth
☐ Backlot	☐ Walking Tune
☒ River of Love	☐ Thanksgiving Waltz
☐ Schottis #2	☐ Pumpkins in the Spring
☐ Backhome Waltz	☐ Skandia Waltz
☒ Kim	☐ Countdown Jig
☐ Christmas Waltz	☒ Circle of Dreams

Dear Leonard:

I love your album, *Starlight Sonata*, and I have checked off the selections I will be playing on my station.

Sincerely,

Signature

Side One	Side Two
☐ Starlight Sonata	☐ Quinn Elizabeth
☐ Backlot	☐ Walking Tune
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☐ Schottis #2	☐ Pumpkins in the Spring
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☐ Kim	☐ Countdown Jig
☐ Christmas Waltz	☐ Circle of Dreams

Dear Leonard:

I love your album, *Starlight Sonata*, and I have checked off the selections I will be playing on my station.

Sincerely,

Stewart Meyers

Signature

Side One	Side Two
☒ Starlight Sonata	☐ Quinn Elizabeth
☐ Backlot	☐ Walking Tune
☒ River of Love	☐ Thanksgiving Waltz
☐ Schottis #2	☐ Pumpkins in the Spring
☒ Backhome Waltz	☒ Skandia Waltz
☐ Kim	☒ Countdown Jig
☐ Christmas Waltz	☒ Circle of Dreams

Musicians' Association of Seattle
Local 76, A. F. of M.

2620 Third Avenue
Seattle, WA 98121
(206) 441-7600

May 26, 1994

The Honorable Representative William J. Hughes
Chairman, House Subcommittee on Intellectual Property and
Judicial Administration
207 Cannon House Office Building,
Washington, DC 20515

JUN 8 1994

SUBC. ON IPJA

Re:Statement for the Record for the Hearing of Febru
23,24, 1994 on Music Licensing, BMI, ASCAP.

Dear Representative Hughes:

It has come to our attention that a review is being conducted of the activities of music licensing agencies including BMI and ASCAP. As professional musicians, we support any systems that exist to insure proper remuneration for services rendered and this certainly includes music composition and publishing. To this end, the existence of licensing agencies is justified.

We have seen complaints regarding the way these licensing agencies operate and their negative impact on businesses which use licensed music. Many smaller copyright holders feel the system denies them the opportunity to receive any performance royalties whatsoever, and many smaller venues feel the license fees are excessive and punitive.

After much discussion and brainstorming, we have come to the conclusion that the abuses are a consequence of the outmoded methods by which music performances are counted. It was once believed that, due to the huge number of musical performances for profit which occur at any time, an actual accounting would be impossible. This was long before the advent of digital technology and the personal computer. Complicated sampling systems were devised to estimate usage for the purposes of determining license fees and distribution of revenues.

The estimates achieved by sampling are most often inaccurate and the sampling system is essentially incapable of recognizing the existance of musical performances which are not in the "superstar" catagory of frequency. This results in arbitrary license fees which often have the unintended effect of forcing small venues to abandon the use of music altogether as well as preventing lesser known composers and/or publishers from receiving their share of the revenues collected.

It is our feeling that the most productive course to take at this time is to abandon the outmoded sampling systems and proceed immediately with a new system utilizing the new personal computers and digital technology which are now available. This modern technology will make it possible for any venue, no matter how small, to count precisely the actual use of all licensed work. This information could than be collated in a large central computer which would calculate payments for all participants. The technology to log and collate this material will ultimately be less cumbersome and costly than the outmoded sampling methods and will result in all copyright owners being properly compensated rather than just the famous and well-established ones as is now the case. Additionally, venues will only be billed according to actual use, instead of the presumed use that results from sampling, thus enabling each to determine and control this cost.

We believe that a solution with these features will permit all of the affected institutions to continue free of the conflict between creators, users, and licensors of music that has marred our history. Nobody needs to be sacrificed to bring it about, and the fair distribution of earnings which was always the ultimate goal will now be realized.

Very Truly Yours,

Peter E. Leinonen
composer, publisher (BMI),
vice-president Local 76, Musicians Association of Seattle,
American Federation of Musicians.

CITY OF KENT

Jim White, Mayor

May 27, 1994

Honorable Representative William J. Hughes
Chairman, House Subcommittee on Intellectual Property
and Judicial Administration
207 Cannon House Office Building
Washington, D.C. 20515

Statement for the Record for the Hearing of February 23, 24 on Music Licensing, BMI, ASCAP

Dear Congressman Hughes:

I am writing to urge your support for a full congressional investigation of the practices of music licensing organizations such as ASCAP, BMI and SEASAC, and the underlying US copyright law.

I am the Cultural Arts Coordinator for the City of Kent Parks and Recreation Department and the municipal Arts Commission. Our programs are designed to bring cultural vitality and to build connections in our community of about 40,000. Our Arts Commission is comprised of twelve volunteers, and is financially supported through taxpayer monies, state and county grants, private foundations, business and private sponsorships, and earned income. The majority of our programs are offered free to the community; those that are not free are often subsidized, resulting in tickets being offered to the community at prices substantially lower than you would find in the private sector. Additionally, we offer a scholarship fund that enables access to all programs for the many low-income families in our community.

Recently we have been aggressively contacted by ASCAP, the American Society of Composers and Publishers, and threatened with exorbitant fines and legal action if we do not pay ASCAP licensing fees. While I understand that the original intent of copyright law and music licensing organizations was to protect those that create musical works and provide compensation to creators, the current system does not work fairly or effectively.

Our programs are non-commercial, non-profit, and presented for the good of our community. Most of our performances feature very little, if any, copyrighted material being performed by someone other than the original composer. Nevertheless, under current copyright law and practice, we are being asked to pay the same licensing fees as purely commercial or for-profit ventures. The existing exemption offered for purely "non-commercial" performances under USCA Section 110 Title 17 does not apply to us because we offer performers compensation for their time and talents. Given that our mission is to support the arts, and therefore artists, in our community, we feel that the small monetary compensation we are able to offer to performers is an important part of that equation.

I would like to cite a specific example. We sponsor an annual program called Kent Kids' Arts Day, which involves more than 2,500 children and families as participants. The primary focus of the event is more than a dozen different participatory arts and craft projects that are led by professional artists. This event involves more than a dozen local elementary schools and hundreds of community volunteers. A modest admission charge partially covers production costs, which are kept to a

... KENT, WASHINGTON 98032-5895 / TELEPHONE ... FAX ...

minimum, and more than 400 free tickets for disadvantaged youth are distributed through schools and local social service agencies. Grants, sponsorships, and business donations also support the program. Because the event includes a performance stage, ASCAP claims that we must legally comply with copyright law by paying their festival rate. The stage features local elementary school choirs, community children's groups, and usually a clown or other children's entertainer. In 1994, none of the paid performers were performing any copyrighted musical works, although presumably the unpaid student choirs were. ASCAP informed us that the fact that any performers were paid disqualified this event from fee exemption. Therefore, the Arts Commission was told to pay a $50 per day festival rate for presenting elementary choirs at our children's festival.

A second example would be our music in the parks series. Each summer, we offer eighteen free concerts for children and adults in our municipal parks. These events are purely non-commercial and generate no revenue. In fact, we lose money. We do these programs because they benefit the community. But because the performers are paid, we lose our right to a non-commercial exemption. The future of programs like these is threatened by the licensing fees being demanded by the various licensing agencies. I encourage you to expand nonprofit exemptions from copyright liability, or at least establish a standard lower fee scale for such non-profit community events.

Not only are music licensing organization fee rates an unfair burden to small presenters, music licensing societies are not reasonable, fair or effective in their practices. It is virtually impossible to receive any concrete information about what music is under copyright with a given society, and the general operating style seems to be one of threats and intimidation. Furthermore, it is well documented that local member composers and artists receive little, if any, compensation from ASCAP or BMI despite the fact that local presenters are being required to pay fees for presenting these artists and others who perform their works.

This system is broken and punitive. I urge you to ask for and fully support congressional investigation and reform to ensure that music licensing organizations do not cause an end to small presenters, and that they be held accountable to better serve their member artists and their communities at large. Thank you for your consideration.

Sincerely,

Tracey Wickersham
Cultural Arts Coordinator
City of Kent Arts Commission
Kent Parks and Recreation

Icebird Record Company
5109 Pt. Fosdick Dr. N.W. #E155
Gig Harbor, WA 98335
(206)884-9705

May 28, 1994

Honorable Representative William J. Hughes
Chairman, House Subcommittee on Intellectual Property
and Judicial Administration
207 Cannon House Office Building
Washington, D.C. 20515

Statement for the Record for the Hearing of Feb 23, 24, 1995 on Music Licensing, BMI, ASC & P.

Sir:

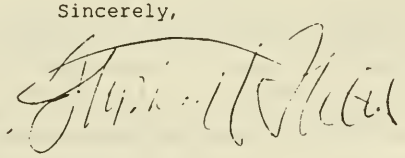
I am a singer-songwriter with my own record label. I am a member of Broadcast Music Incorporated (BMI). My wife and I have had airplay all around the US, Canada, and England as well as other European countries. Out of all of our airplay for our various recordings, the only airplay that has paid royalties has been foriegn. My fellow songwriters (some much more successful than myself) are impressed that I have recieved royalties at all.

I also have had occasion to question the very integrity of BMI. I initially joined at the request of a vanity record label, Eagle Records who had connections at BMI for me getting membership directly. Although we are not talking about alot of money in royalties, BMI helped the individual running Eagle Records (Guthrie Thomas) present a front of legitimacy. In spite of numerous written communications on my part I have not been able to resolve questions of ownership of publishing of certain of my songs. I don't know why BMI would be involved with someone like Guthrie Thomas. He may have practiced some kind of deception on them as well as he did me. I suppose that they have failed to resolve my questions of publishing ownership because I represent such a small

As an artist I want to participate in the system of royalties that has been established. The only path I can see to this participation is the performing rights societies. Unfortunately it would seem that they are in place only to serve the interests of the extremely successful and those in the upper echelons of the music industry. Whether this is indeed true, or just a perception, it is true that those of us on the bottom of the industry do not feel represented by these organizations.

I, for one, would like to know the truth about BMI and ASCAP, where their money comes from, where it goes. I would also like to know that if my recordings are played, I will be paid. With new pathways for small record companies and individual artists to get their material to the consumer, there will be ever a greater need for the performing rights organizations to be accurate in tracking airplay and paying royalties. I think that now at the top of development of new electronic mediums is the time to call for a full scale investigation of BMI and ASCAP.

Sincerely,



Steve Nebel
Icebird Record Company

June 1, 1994

Honorable Representative William J. Hughes
Chairman, House Subcommittee on Intellectual Prperty and Judicial Administration
207 Cannon House Office Building
Washington, DC 20515

STATEMENT FOR THE RECORD FOR THE HEARING
ON FEBRUARY 23,24, 1995 ON MUSIC LICENSING, BMI ASCAP

As a performing songwriter I am being hurt by BMI and ASCAP because they demand exorbitant fees from very small venues who support emerging performing songwriters. These venues usually make little to no money. They are mainly run by volunteers. Any money that is made is put toward paying the songwriter and promotional costs. Several of these venues has been forced to close because they cannot afford to pay BMI, ASCAP fees. This leaves me with even less of a chance to make a living, because many venues are not interested in performers who perform their own songs.

On the other side of the coin, although the fees are supposedly being divided among the songwriters that are members of BMI and ASCAP I have yet to see any money. I have been a member of BMI for 3 years. I play about 120-150 performances per year. The performances consist of about 2/3 my own songs. My songs are also played on over 100 radio stations per year. But I have yet to receive any performance rights money from BMI.

My feeling is that BMI and ASCAP exist to make the rich get richer--to pull in more money for songwriters who have already made it and have hit songs on commercial top 40 stations. The remaining songwriters (and I might add the overwhelming majority) gain little or nothing from membership in these organizations. In fact, we lose when the limited number of venues available for us to perform in are shut down because of inappropriate fees demanded by BMI and ASCAP.

Barb Martin

Barb Martin
Performer and Song writer

p.o. box 2631 staunton, va 24402-2631 (703)886-2966

1048 Maryland Avenue
Schenectady, New York 12308
June 1, 1994

Congressman William J. Hughes
Chairman
House Subcommittee on Intellectual Property
and Judicial Administration
207 Cannon House Office Building
Washington, DC 20515

Re: Statement for the Record for the Hearing of February 23-24, 1995 on Music Licensing, BMI, ASCAP

Dear Congressman Hughes:

I am extremely concerned about what I perceive to be the strong-arm tactics being applied to small folk music venues, combined with the non-payment of royalties to those folk music artists who are, in my opinion, creating some of the finest music coming out of this country today. I have written to my congressional representatives, and am enclosing a copy of one letter which I sent to my Congressman Michael R. McNulty. Similar letters were sent to Senators Moynihan and D'Amato. My letter provides details of my experience with this issue.

I applaud your investigation into the practices of ASCAP and BMI and urge your committee to continue looking into what I consider to be unfair pressure and strong-arm tactics on the part of these organizations, which, ostensibly, are supposed to be advocates for musicians and the venues in which their music is presented. Instead of acting this way, however, ASCAP and BMI are using the approaches similar to those of hoodlums and gang members by applying intense pressure to the small clubs which cannot afford to pay the licensing fees. I am afraid that we will see these clubs made extinct because of the legal fees associated with the pressure being brought on them by these giant organizations, which make millions of dollars each year on the backs of small, less-popular musicians and smaller clubs.

Licensing fees are simply a drop in the bucket to major artists and the venues in which they perform. In turn, they receive enormous amounts of royalties. The folk artists, on the other hand, receive virtually nothing in return.

Please consider my comments as part of your committee's record. If you need to contact me during the day about this issue, my phone number is 518-449-2707.

Thank you for the opportunity to comment on this issue.

Sincerely,

Wanda A. Fischer

Wanda A. Fischer

1048 Maryland Avenue
Schenectady, New York 12308
June 1, 1994

Congressman Michael R. McNulty
Room 217, Congressional Office Building
Washington, DC 20510

Dear Congressman McNulty:

While recognizing that you and your colleagues are extremely busy these days in dealing with health care reform, foreign policy, and deficit reduction, I am writing to alert you to another potentially problematic issue that has to do with contemporary folk music and writers of such songs.

I have been involved in folk music for many years, beginning in the 1960s when I was a high school student in Massachusetts. I have also been involved in public broadcasting and hosting a folk music show for more than 16 years, both in the Albany area and in Worcester, Massachusetts, where my husband attended medical school. I have always been supportive of the efforts of folk musicians to support themselves through their music and their writing. However, several years ago, a musician contacted me and asked me to look through the back logs of my folk music show and tell him how many times I had played his music (either his own performance or other interpretations of his songs) throughout the years. I thought this was a preposterous request, especially since I play so much music annually. I thought he was asking me to do something for his own ego gratification.

Not so. I have since learned that he--and others like him--was only trying to prove to ASCAP and BMI (the two organizations to whom radio stations and other groups pay royalties, and, in turn, are supposed to pay royalties back to the musicians) that his music was indeed getting airplay, and that he was due some royalties from that airplay.

As it turns out, folk musicians and others who perform out-of-the-ordinary music do not receive royalties. ASCAP and BMI have decided that such alternative music formats are not worthy of recognition, despite the fact that these writers put their hearts and souls into creating such songs. Janet Jackson and Garth Brooks, for example, have no problems getting royalty payments, because their music appears on mainstream radio. ASCAP and BMI primarily monitor mainstream radio stations. So the rich get rich, and the poor folk musicians get practically nothing.

At a meeting of the Folk Alliance held in Boston earlier this year, a representative from ASCAP met with musicians and other conference attendees. She said that ASCAP monitors all kinds of stations, but that the big stations with larger audiences tend to be monitored more

June 1, 1994

frequently, thereby ensuring that highly popular musicians and their works would be more apt to appear on ASCAP listings for receiving royalties. I suggested at that meeting that I would send her playlists every Monday from my shows the previous Saturdays. Her reply was that radio station disc jockeys "lie" about what they play on the radio, and that frequently their playlists do not match what actually went out over the airwaves. I was highly insulted by the accusation of being grouped into the "lying d.j." category," but I am willing to submit playlists to assist ASCAP in getting the appropriate fees to the correct songwriter.

Since I do not benefit from sending playlists to ASCAP or BMI, I have nothing to lose or gain from trying to help them; however, this woman went on to say that ASCAP made an astronomical amount of money from charging royalties from organizations playing music (I cannot recall the exact figure, but it was in the millions). **And they charge the small folk music clubs an exorbitant amount each year to have folk musicians perform their own music in these folk clubs.** Some of the folk clubs are facing bankruptcy or even extinction because they simply cannot pay their ASCAP and BMI fees. And ASCAP and BMI--instead of going after the "big fish" in the seas--are now applying serious legal pressure on these small clubs. In many cases, it is analagous to gangland-style threats to small, not-for-profit and barely-surviving clubs. **Several such venues are in your congressional district.**

This would not be as much of a problem if the folk musicians were actually receiving their royalties from ASCAP and BMI. But they don't. In fact, if you aren't a top-name musician or songwriter, you can almost forget about getting any royalties at all from your material.

During the Boston session, one musician who wrote a song in the 1960s and who has yet to receive one penny in royalties spoke up to talk about this. I have heard this song on MUZAK in elevators, as well as being done by many other musicians. He said that no one has ever paid him for this song.

So where is this money going? That's the question I put before you and the Congress. At a time when the arts are being asked to withstand funding cuts, Congress cannot stand idly by and let ASCAP and BMI keep the royalties that belong to the lesser-known artists. Congress must continue to investigate ASCAP and BMI and their profit-distribution practices--an investigation which was started with hearings held in February by the House Subcommittee on Intellectual Property and Judicial Administration.

Some of the finest music being written in this country today is being created by contemporary folk artists. They are literally being cheated out of what is rightfully theirs by groups who are, ostensibly, their advocates. ASCAP and BMI are making millions of dollars in royalties and not sharing these profits with their rightful owners.

This is not the American dream; it is an American nightmare.

Sincerely,

Wanda A. Fischer

Wanda A. Fischer

Songwriters
And
Musicians
Foundation

Statement for the Record
for the Hearing of February 23, 24, 1995
on Music Licensing, BMI, ASCAP

Honorable Representative
William J. Hughes
Chairman House Subcommittee
on Intellectual Property and Judicial Administration
207 Cannon House Office Building
Washington, DC 20515

June 1st, 1994

Dear Sirs:

We are a Non-Profit organization dedicated to the encouragement and presentation of original music in our locality. We understand that Congressional hearings are being held concerning the business practices of music licensing organizations such as ASCAP and BMI.

As a support group for local songwriters, some of whom are members of BMI or ASCAP, our concerns focus primarily on the distribution of the funds which are collected as royalties by these organizations. The recent upsurge in independently released music has resulted in a growing number of ASCAP or BMI members who *are never paid* royalties on their published works even though their music *is receiving radio air play.*

We can understand why the reporting and distribution system that presently goes with Blanket Licensing may be inevitable for live performance venues, but it should be possible to work out a system for broadcast media that would allow the royalties to be distributed correctly.

Also most Songwriters would be happy to have their songs performed in *non-profit situations* without collecting royalties. We feel that Licensing of live performance venues should be restricted to *profit making* venues only, and that those fees should be kept low enough that music venues do not have to close down because of them. It might be more equitable to charge venues a small percentage of their profits during music hours rather than a set fee. We would like to see the efforts of music licensing organizations encourage rather than restrict the people who make music.

Sincerely,

David Jennings, pres.
S.A.M. foundation

S.A.M. foundation, 203 W. Holly, Rm 208, Bellingham, WA 98225

COFFEEHOUSE UPTOWN
Wilson Memorial United Methodist Church
3509 N Charles St @ University Pkwy * Baltimore, MD 21218

June 1, 1994

The Honorable William J. Hughes
207 Cannon House Office Building
Washington, DC 20515

Re: Statement For the Record for The Hearing of February 23, 24, 1995 on Music Licensing, BMI, ASCAP.

Dear Representative Hughes;

I have been an active volunteer, in the Baltimore/Washington area, for the preservation of folk and acoustic music for about ten years. Six years ago I became involved with a church run coffeehouse-concert series. This was when I first became aware of ASCAP and BMI.

Our coffeehouse as most, is non-profit, smoke and alcohol free. We feature primarily singer songwriters, weekly from September through May, performing their own material or musicians performing traditional music. Our church happens to be a large one, however our average audience for 1994 is about 90 people. But because our church is large ASCAP wants $1,600.00 dollars from us for 1994 and $1,500.00 for 1993. None of the volunteers receive any remuneration for their hard work to maintain the coffeehouse. The only people getting paid are the musicians themselves. The rest of the money goes to supporting the expenses of operation. Printing, postage, long distance phone calls, sound equipment, lighting, etc.

Our cover charges range from free, for open mikes, to $7.00 to 12.50 for programs. We also have hosted many benefit concerts for various community charities ex: Homeless Shelters, Aids Hospice and Children's Organizations. In the past few years we have raised over $20,000 for these charities. All the money raised was given to the charity it was raised for and the coffeehouse absorbed any expenses.

So far we have only oeen contacted by ASCAP. (I have friends that operate coffeehouses in other areas and also have only been contacted by either ASCAP or BMI. Not both until they paid one. I personally find this curious.) ASCAP has told us we must pay them for the rights to have our performers sing music in our coffeehouse. It does not matter if the performers are performing ASCAP licensed material or not. It does not matter if the performer is himself or herself a member of ASCAP. They say we must pay them on the chance an ASCAP licensed song is performed. Such as Happy Birthday. They have told us we could be fined as much as $20,000. a violation. They send lists of places they have sued and cases they have won. They [illegible] pretend they are [illegible].

CoffeeHouse Uptown
Wilson Memorial United Methodist Church
3509 N Charles St @ University Pkwy * Baltimore, MD 21218

songwriters. But the truth is they are protecting the conglomerate that had the money to purchase the writes to songs. Ask Paul McCartney, he does not own the rights to the Beatles songs, Michael Jackson does. However Paul owns Happy Birthday. And so it goes.

The reality is ASCAP wants me to pay our performers less money. Our traveling singer/songwriters, that move from town to town on the money they make gig to gig. Our songwriters that hope their hosts will provide housing and food, since many times they have barely made enough to move on to the next gig. If they're really lucky, they will get a room to themselves, instead of the living room sofa, a shower and maybe even a chance to do some laundry. But ASCAP says I need to pay this singer/songwriter less so I can pay them their unreasonable fees.

Keep in mind that most of these folk musicians never see a nickel from ASCAP. Even if they are registered with them. The reality is that ASCAP and BMI never ask us for play lists or artist lists. They pay their members for the most part from commercial radio airplay. However, most folk artists receive their airplay on public radio and or weekend programming. Neither of which is monitored by ASCAP or BMI.

Many a volunteer coffeehouse has been forced to close because of the unreasonable charges by ASCAP and BMI. They won't negotiate. They have a scale that runs on cover charges and size. Not on patronage, or non-profit status.

I feel their free ride has gone on too long. I feel they need to be accountable for how they charge and who they charge.

Thank you for looking into this matter.

Sincerely,

Joyce B. Sica
3607 Northgreen Road
Baltimore, MD 21244
410-922-3210 home
410-944-4004 work

Sue Trainor, PO Box 412, Columbia, MD 21045
410-381-2834

June 2, 1994

The Honorable Representative William J. Hughes
Chairman, House Subcommittee on Intellectual Property and Judicial Administration
207 Cannon House Office Building,
Washington, DC 20515

STATEMENT FOR THE RECORD FOR THE HEARING OF FEBRUARY 23, 24, 1995 ON MUSIC LICENSING, BMI, ASCAP

Dear Mr. Hughes:

As a songwriter and as a producer of folk music concerts, I am writing to support a Congressional investigation of the practices of ASCAP and BMI, especially with regard to the application of rules and policies to venues and songwriters whose work is outside the mainstream.

I produce volunteer-operated, not-for-profit Folkal Point concert series in Columbia, Maryland. We have been trying for several years to negotiate a reasonable contract with ASCAP through our professional association, The Mid-Atlantic Coalition of Folk Music Presenters, Inc. We also have spoken with representatives of BMI.

We appreciate that songwriters are entitled to be paid for performance of their songs. We do not agree with the way that the money is currently collected from venues and distributed to songwriters who fall into "alternative" music categories, such as folk music. Our situation is different from the mainstream music venues operated for profit (or not), where people make their livings from operating the venue, and where "popular" music is performed.

ASCAP & BMI pay songwriters based on formulas involving the frequency of performance in TV and radio broadcasts samples. The problem in alternative music circles is that the music is rarely broadcast on TV or commercial radio, so the songwriters' access to income from performances of their songs is extremely limited. We have been told that ASCAP & BMI wouldn't accept documentation from live performance at The Folkal Point as a basis for paying songwriters whose music is used. We understand that the Canadian performing rights organization, SOCAN, does accept such evidence for use in calculating payments to writers.

As for the venues, in folk music particularly, many are volunteer operated, not-for-profit events. In our case, only the performer (often the songwriter) makes any money

Our admission fee is already as high as we dare charge. The money we collect covers the costs of publicity and some equipment and the rest goes to the artists. We are not making our living at the expense of the songwriters. To the contrary, we are in the ironic position of working for free to promote the songwriters, but in doing so, we're supposed to give some portion of the ticket money (which is the songwriter's income) to ASCAP & BMI. The songwriters don't get the money back from ASCAP and BMI because they don't get enough airplay. It shouldn't be surprising that we resist.

Our concerts do include a very small percentage of songs licensed to ASCAP and BMI performed by artists other than the songwriter, and we have been been trying in good faith to negotiate discounted blanket licenses with ASCAP and with BMI that are more appropriate to our use and to this non-commerical situation. Thusfar, ASCAP's position at the policy level has been very rigid -- their blanket license proposal to us is more than twice the amount we know they have negotiated with individual venues like ours (and which is still too high as long as our songwriters can't get payment from ASCAP). BMI has not yet given us a proposal.

As a songwriter myself, I have not affiliated with either ASCAP or BMI, although I know my songs are getting airplay on public radio around the country. It just doesn't seem worth the time and effort, knowing I'll never see a check unless something I write gets commercial attention. In other words, writers like me (and multitudes who are much better known!) don't have access to effective collection services. It also feels inappropriate to associate myself with organizations who are known to harrass and intimidate people in the process of doing business. I cannot offer examples of that treatment personally -- most of my dealings have been with ASCAP & BMI executives as an Officer of the Mid-Atlantic Coaltion of Folk Music Presenters -- but many of my peers can offer direct testimony in that regard, and I hope that they have written to you as well.

Thank you for your consideration.

Very truly yours,

Sue Trainor

Sue Trainor, Producer
The Folkal Point

cc: The Honorable Representative Carlos Moorehead
The Honorable Representative Benjamin Cardin
The Honorable Senator Barbara Mikulski
The Honorable Senator Paul Sarbanes

FOLK ALLIANCE

North American Folk Music and Dance Alliance
POB 5010, Chapel Hill, NC 27514 919/962-3397

DATED: June 3, 1994

Honorable Representative
William J. Hughes, Chairman
House Subcommittee on Intellectual Property and Judicial Administration
207 Cannon Office Building
Washington, DC 20515

STATEMENT FOR THE RECORD for the Hearing of February 23, 24, 1994 on Music Licensing Procedures and Organizations like BMI and ASCAP

Dear Representative Hughes:

I am writing on behalf of the nationwide Folk Alliance, a 1300 member non profit corporation of musicians, small and medium size non profits, small and independent music presenters, bookers, agents, arts organizations and industry suppliers. The Folk Alliance is very pleased that you are addressing the procedures and operations of licensing organizations like ASCAP and BMI and **hope Congress will broaden the base** of inquiry beyond choral groups, convention-like facilities, Spanish speaking and classical radio.

Every style of music from pop, jazz, classical, folk, country, dance, blues, old time dance, alternative rock are **adversely effected by the way ASCAP and BMI administers, collects and distributes funds.** And virtually **every industry segment has legitimate complaints** as to ASCAP and BMI's administration, from the composer to the performing musician, from radio airplay to television, from the small non profit arts organizations who present music to the large festivals, from government entities to parks and recreation departments, from small restaurants and coffeehouse that put on music, to the booker and agents in music.

The **Folk Alliance fully supports the collection of fees for use of composers songs** in virtually every situation. Our membership is made up of at least 30% composers. And we recognize licensing organizations as the way to structure that. What The Folk Alliance wants investigated and changed is the way such licensing organizations like ASCAP and BMI collect, set fees, distribute and administer the funds on behalf of the composers and musicians. Our specific concerns, which effect not only the styles of music we work with, but every style of music are:

• I. In clubs, restaurants, coffeehouses, festivals, church, open mikes, jam sessions, workshop events, non profit presentations **ASCAP and BMI fail to track or take song lists** of what songs are played

A. Therefore **no credit is given to a copyrighted songwriter** playing their own compositions.

B. No credits is given for lesser know regional and national songwriters whose compositions are played in smaller or alternative music style venues (folk, jazz, classical, blues, alternative rock, etc.)

C. **The facility or presenter paying the licensing fee to ASCAP and BMI sees no relationship between the money they pay and what is being presented** in their facility and balks at a fee that does not support the music presented. And the facility has no way of judging if BMI or ASCAP songs have actually been played on their stage.

D. Presenting facilities have paid ASCAP and BMI dollars for blanket licensee where local musicians play their own songs and **yet none of that money comes back to those musicians.**

• II. ASCAP and BMI unfairly distributes the moneys collected and structures the system so only **the famous, heavily played radio and television composers get tracked and paid.**

A. ASCAP tracks only selected major commercial radio stations and television to **"guess" how many times a composer gets played** and therefore what part of the pie that composer gets.

B. There is **little or no play list collection** or tracking by ASCAP and BMI in **public and non commercial radio**, so lesser known artists are for the most part left out of the equation. The occasional tracking of Christine Lavin or Patty Larkin are the exception and for every one of those musicians there are 100's not tracked at all.

C. **There is no tracking (taking lists of songs played) in those places presenting live music. Thus no credit given the composer.**

D. Local composers and musicians just starting out in commercial music and those in alternative music almost never get tracked and never get their fare share of the pot. **In essence the licensing organizations like ASCAP and BMI remove money from their own artists to pay the big name acts.**

• III. There is **no sliding proper fee scale** system in place to recognize the **small venues in which music is a small part of their business,** even in some cases a non, or negative income generating afterthought. The venue presents music because they like music or musicians. These many times are the **cornerstone of a composer or musician getting started** and should be encouraged, not discouraged. This happens in small restaurants, deli's, coffeehouses and similar venues. They pay a disproportionate fee and in many cases discontinue or reduce music performances. In a few cases venues have even gone out of business because of these licensing fees.

• IV. There is **no proper fee scale system to recognize the non profit organization venues that put on small 20-200 seat shows** that sometimes have no or little ASCAP, BMI material and should have an entirely different fee scale. Again they provide the local, beginning and alternative music scene with a viable way to stay alive and should be encouraged.

• V. There is **no proper fee scale** system that recognizes the unique positions like Parks Departments, Recreation Centers, Zoos and similar **public tax supported facilities**. These may hold events in a number of venues from streets, parks, senior centers etc. and get caught up in multiple pricing schemes, high prices, and double dipping situations.

• VI. There is **no proper fee scale** system to recognize the unique aspect of old time jam sessions, teaching camps, open mikes, song circles and other **critical playing and learning opportunities for upcoming and alternative music.** ASCAP and BMI have been going after these heavily. There is a good case for exemption in this area or a very minimal fee.

• VII. Songwriters and composers do not get a part of the pie because **they would never join BMI and ASCAP,** knowing already the system excludes them trough blanket licensing, poor and improper tracking and terrible distribution systems. We estimate that 70-75% of the original songwriters and composers that record do not license

and get cut out of the division of moneys. Why would a local musicians pay BMI and ASCAP for no services? They have not been protected or represented.

• VIII. **BMI and ASCAP fail to make their song list conveniently available so a venue or organization can see if the music they present violates any copyright.** No one can afford to travel to New York to look at the song list by appointment. And further, they go after venues that present no BMI or ASCAP material, harassing and using the threat that someone might and they would be liable.

• IX. Our membership involved with venues and the composer-performers continually site **ASCAP and BMI's harassment, intimidation, overpricing, double dipping practices.**

A. This causes venues to discontinue, reduce or limit performances of composers.

B. Composers find less employment and usage of their songs.

C. **This has a chilling effect on local employment for local composers and songwriters, reduces income to performing songwriters and reduces royalties to songwriters.**

D. The very law that was to protect songwriters penalizes the local, upcoming recording songwriter and removes money from them.

These are just some of the concerns of the Folk Alliance and cause us to request a **full scale congressional investigation of all music licensing organizations.** The system needs a major revamp in light of the complaints from across the industry and in light of new computer technology that allows better tracking and distribution systems.

The Folk Alliance, since it represents such a wide base of music and so many segments of the industry would hope that these hearings would be reopened and that the Folk Alliance would have a chance to testify. Further, the **Folk Alliance would like to be at the table to work on these problems and help develop meaningful solutions** that would be equitable for composers, musicians, venues, non profits, radio, facilities, and government entities.

Thank you for your consideration on this complex issue.

Sincerely,

Chris Lunn, Board ofDirector
for the Board of Directors and Membership
North American Folk Music and Dance Alliance
POB 5010, Chapel Hill, NC 27514
919/962-3397 Fax 919/962-4453

ARTSBRIDGE

402 Juliana Street
P.O. Box 1706
Parkersburg, WV 26102
(304) 428-3988

316 Third Street
Marietta, OH 45750
(614) 373-0079

June 3, 1994

The Honorable Representative William J. Hughes
Chairman, House Subcommittee on Intellectual Property
and Judicial Administration
207 Cannon House Office Building
Washington, D.C. 20515

Statement for the Record for the Hearing of February 23, 24, 1995 on Music Licensing, BMI, ASCAP.

Representative Hughes:

As a community arts council which represents thousands of musical artists, I would like to join the mass of organizations and individuals who are presently requesting a full scale Congressional investigation regarding the practices of musical licensing organizations.

As you know, on February 23 and 24, 1994, the House Subcommittee on Intellectual Property and Judicial Administration began oversight hearings on the practices of performance rights societies (ASCAP, BMI, SEASAC). Testimony at these hearings is worth your consideration as it well describes the current problems experienced by many ARTSBRIDGE associates in their exchanges with the aforementioned societies.

Musical artists and the organizations which support them are a viable part of the creative and economic community. It is our hope that a Congressional investigation will result in measures which force licensing agencies to consider the needs and capabilities of the small business and the individual performer. At the present time, fees and requirements target large, commercially successful ventures and often eliminate opportunities for those in the early stages of their careers and the presenters who choose to support them. By insisting on a "sliding scale" for participation fees, Congress will best service the needs of the creative community by encouraging growth in an affordable climate.

Thank you for your consideration.

Sincerely,

Lisa D. Starcher
Executive Director

America's River Heritage Trail

Lou & Peter Berryman, Box 3452
MadisonWI 53704 **608-242-4160**

7 June 1994

Hon. Rep. William J. Hughes
Chairman, House Subcommittee on Intellectual Property & Judicial Administration
207 Cannon House Office Bldg.
Washington, DC 20515

STATEMENT FOR THE RECORD for the Hearing of Feb. 23 & 24, 1995 on Music Licensing, BMI, ASCAP

We understand that congress is reviewing the way in which ASCAP and BMI conduct their business. As full-time professional musicians, and songwriters who have belonged to BMI since 1982, we would like to request that Congress launch a full-scale investigation of both these music licensing organizations. Their failure to act in a fair, equitable and efficient manner has had a detrimental effect on our business, as well as that of numerous other musicians and music industry businesses

We are songwriters, recorded by our own independent label. We could be called "minor artists" I guess, as we play locally, with some national touring. Though I do not wish to minimize our relative importance, it is important to emphasize what a very small amount of money is generated by our music, both through professional fees and licensing. Despite this fact, both ASCAP and BMI have attempted to extract money from the venues at which we play far in excess of the amount brought in by our playing. Both these organizations have used threats and intimidation against several of these places. Both these organizations have asked for outrageous sums of money, only to settle for greatly reduced amounts, implying a random fee assignment, based on the venue's response to the pressure on them, rather than a fair calculation.

The Club de Wash in Madison, Wisconsin was harassed frequently for thousands of dollars in license fees, even though the only music being performed there was ours and a blue grass band playing public domain material. The Capital Brewery Beer Garden in Middleton, WI, stopped having music altogether for a time rather than pay the excessive fees assigned them. The Cafe Carpe in Fort Atkinson, Wisconsin has also been the object of intimidation tactics to extract money from them. These are just a few examples of venues which we know about which have suffered because of the current practices of ASCAP and BMI.

All of these venues hold performances of music on the periphery of the music industry, music which does not appear frequently enough ANYWHERE in order to benefit from payments made to BMI and ASCAP by their current accounting methods, which are based on a national averaging system which rewards only the musicians whose work is performed very widely.

The point is not whether these venues should pay songwriters for the performance of music. It is the accounting and collection methods of the music licensing organizations which should be scrutinized. I appreciate you and the rest of Congress looking into this matter which has so plagued us non-mainstream musicians.

Sincerely,

Lou Berryman

copies: Hon. Rep. Carlos Moorehead, Minority Chairman, House Subcommittee on Intellectual Property Administration
Senator Herb Kohl
Senator Russ Finegold
Congressman Scott Klug

Statement for the Record for the Hearing of
February 23/24, 1995 on Music Licensing, BMI, ASCAP

In my opinion, the music licensing organizations ASCAP and BMI should be examined and regulated. They have run roughshod over musicians and promoters for years, paying royalties to the famous and ignoring lesser writers, and not only show no sense of flexibility in regard to small, non-profit events, but are not even civil to people who must deal with them.

I attend several open mics, none of which takes in much money. They either pay the fees, which are the major overhead for the event, or hold the event without paying, and worry about the "song police." The Streamliner Diner, Bainbridge Island, WA, ceased presenting music due to pressure from BMI, as have some Seattle cafes. Arts By the Bay, which has music as a part of an outdoor arts and crafts festival in Poulsbo, WA, restricts its performers to original or public domain music, as do several other events.

As my main interest in music is in non-mainstream acoustic based music, these organizations have no utility for me. Most of the music I listen to, live or recorded, is either not licensed, or is sufficiently obscure that I know the songwriter will never be paid royalties, due to the unfair monitoring practices of ASCAP/BMI. The radio stations I listen to play very little music that will receive national airplay. My own songs are not licensed because I don't think it would be of any benefit to me, and I do not wish to be affiliated with these organizations. (Incidentally, I have an intuitive feeling that an audit of these organizations might be revealing. When there is that much money and power floating around, many people in the path tend to try to get a lot of it).

Songwriters need protection. If these groups fairly collected and distributed the royalties, with some sense of proportion and consideration for less wealthy events, and were civil, courteous and honest to deal with, I would support them. In my experience, however, they fail completely in all of these, and I hope your actions can be of help.

Sincerely,

Ted Briggs

Ted Briggs-Comstock
15425 Harvey Road
Bainbridge Island, WA 98110

CC State Reps / Senators, Folk Alliance

STATEMENT FOR THE RECORD FOR THE HEARING OF FEBRUARY 23,24, 1995 ON MUSIC LICENSING, BMI, ASCAP

Hon. Rep. William J. Hughes
Chair. House Subcom. on Intellectual Prop. & Judicial Admin.
207 Cannon HOB
Washington. DC 20515

Dear Chairman Hughes;

I am writing to call your attention to the current hearings concerning BMI and ASCAP licensing practices. I am a writer and performer of non-mainstream music and a member of BMI. As matters now stand, BMI practices for collecting and distributing licensing fees has an adverse effect on my ability to earn a living for the following reasons:

(1) The practice of charging fees to small venues and the fines levied for failure to comply have closed several clubs in my area.

(2) When I play my own compositions (which are BMI registered) in a club which pays their performance fees, my potential earnings are reduced due to these fees. Since performance fees are paid to composers based solely on radio airplay, and since the methods for tracking radio airplay is biased in favor of mainstream musicians, this constitutes a substantial decrease in my earning power.

(3) BMI enforcement personel have made it difficult for me to have my recorded music played in restaurants and clubs which offer it for sale.

In addition to these very personal concerns, I have other concerns based on a sense of fairness, as follows:

(1) Since radio stations pay a broadcast fee, levying additional fees on receivers constitutes a form of double-dipping.

(2) Tracking procedures are woefully archaic and unfair to the many thousands of composers who are not involved in pop, country or rock genres.

(3) Not allowing independent reporting of broadcast music is frustrating and unfair to those of us lucky enough to receive high visibility airplay, such as network television, and yet recieve no credit.

(4) The practice of charging a license fee to participants in festivals when they have already paid fees in their home venue is another form of double-dipping.

For these reasons I am asking you to support a full scale congressional investigation of all music licensing organizations.

Sincerely,

Frederick D. Gosbee
Round Pond, ME

BLUEGRASS & COUNTRY MUSIC MAKERS ASSOC
P.O. Box 519
DARRINGTON, WA 98241
(206) 436-1724
(206) 436-1077

June 10, 1994

The Honorable Representative William J. Hughes
Chairman, House Subcommittee on Intellectual
and Judicial Administration
207 Cannon House Office Building
Washington, D.C. 20515

Re: Statement for Record for the
Hearing of February 23-24, 1994

Dear Chairman Hughes:

As a non-profit organization that is required to buy licenses from ASCAP, we wish to have our objection to this forced participation registered and considered by your committee.

We have a Bluegrass music 'jam' once a month at the local High School which is just 'open mike' for local non professional people to perform. Nobody is paid anything for performing, but because we do not know if someone might sing 'covered' material we are obliged to pay $80.00 per year for a license from ASCAP.

We also have a three day Bluegrass Festival each year and we are required to pay $50.00 per day for a license from ASCAP in case some 'covered' material might be used.

While we have no objection to song writers being paid for their talents, we do object to having no way of knowing when or if these monies are properly paid. Any song writers we have asked about this advise they receive nothing for their material from ASCAP. If this practise is to be continued, which we most certainly object to, we want to have some kind of statement each year showing which artists have been paid and how much.

We appreciate the opportunity to have our concerns addressed by your committee.

Sincerely,

Louie Ashe, President

LA/vh

cc:Carlos Moorehead, Minority Chairman
Senator Slade Gorton
Senator Patty Murray
Representative Al Swift

Squire's Own Music

12JUN94

Hon. Representative William J Hughes
Chairman, House Subcommittee on Intellectual Property & Judicial Administration
207 Cannon House Office Building
Washington, DC 20515

STATEMENT FOR THE RECORD for the hearing of February 23, 24, 1995 on
MUSIC LICENSING, BMI, ASCAP

Dear Mr. Hughes:

I ask that you support and request or conduct a full scale Congressional investigation of all Music Licensing organizations like ASCAP and BMI.

I am sure that you are receiving hundreds of letters like this, and therefore many examples of unfairness It is unlikely that any specific case I mention would increase your awareness by its uniqueness, so I will provide only one; but identical circumstances have arisen with every person that I have discussed this with My diary indicates that I have had discussions with 12 performers that I represent, two arts agencies (non-profits) and two music festivals. I believe cases like this must be the nearly universal experience of everyone involved in independent music performance, production and distribution. indicating problems of such proportion as to warrant and merit the attention I am asking you to pay through a comprehensive Congressional investigation.

Incidentally, my company is a BMI member music publisher, most of the performers I represent are BMI member composers, ALL of the performers that I represent regularly perform BMI and ASCAP licensed material in BMI and ASCAP licensed venues, and receive national radio airplay for their own copyrighted and licensed works, and the similarly copyrighted and licensed works of similar emerging artists Not one of us has ever received a cent in royalties!

I coordinated booking of The Cutters and the Suffering Gaels into the Shoreline Arts Commission (a not for profit public arts agency) St. Patrick's Day concert. Everyone involved knew ahead of time that only material in the public domain, or else owned by the performers, would be presented. ASCAP 'obtained' ("extorted" comes to mind as perhaps more apt) a fee from Shoreline Arts by 'informing them' ("threatening" seems not too harsh) that failure to pay would result in legal action to prevent the performance from taking place. None of the composers or music publishers of any of the works performed that night got any portion of the fee collected, and ASCAP wasn't lawfully entitled to collect the fee in this case in the first instance: even if they had been, their methods were illegal.

Very truly yours,

Dane Brooke

Dane Brooke
Executive Producer
(206) 525-8891

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FOLK ALLIANCE
NORTH AMERICAN FOLK MUSIC AND DANCE ALLIANCE

June 14, 1994

Honorable Representative William J. Hughes
Chairman, House Subcommittee on Intellectual Property & Judicial Administration
207 Cannon House Office Building
Washington, DC 20515

Statement for the Record for the Hearing of February 23-24, 1994 on Music Licensing

Dear Mr. Hughes:

The North American Folk Music & Dance Alliance, the Folk Alliance, is a non-profit organization under section 501(c)3 of the Internal Revenue Code. The North American Folk Music and Dance Alliance exists to foster and promote traditional, contemporary and multicultural folk music, dance and related performing arts in North America. The Folk Alliance seeks to strengthen and advance organizational and individual initiatives in folk music and dance through education, networking, advocacy, and professional and field development.

As such, our membership includes several hundreds of song composers and publishers and many dozens of presenters of folk music concerts for the enjoyment and edification of the general public. The activities of both these groups are essential to fulfillment of our educational mission. We need for composers and publishers to be able to make a living, and we need for there to be thousands of venues ranging from small, non-profit coffeehouses to gigantic festivals at which folk music can be performed for the public. The performing rights agencies, particularly ASCAP and BMI, form an important component of this process.

At this point the performing rights agencies do not serve our community nearly as well as we would like. For the reasons outlined below, folk composers and publishers are grossly underrepresented in payouts from these agencies, while many small venues that present folk music have closed their doors rather than pay licensing fees. These situations can be corrected and in such a manner that will benefit not only of the folk community but ASCAP, BMI, and SESAC as well.

That said, The Folk Alliance clearly recognizes that the performing rights agencies perform a vital service to the music industry. The music publishing business could not operate without their efforts. I should point out that The Folk Alliance enjoys cordial professional relationships with ASCAP and BMI. ASCAP, in fact, has always been a generous major sponsor of The Folk Alliance Annual Conference. We have, in turn, afforded ASCAP the opportunity to answer concerns and questions and recruit members at our events. We have always paid the requisite fees for our events to both ASCAP and BMI, and would be happy to pay SESAC should any of their catalog ever be performed at our conference. We have no desire to throw the baby out with the bath water.

The most significant problem in this area derives from the methodology used in determining the payments from ASCAP and BMI to publishers and composers. Unlike the performing rights agencies in other nations, ASCAP and BMI depend almost entirely on television and a sampling of radio to create a model of what is performed live. The very existence of ASCAP's special awards program constitutes an admission that the system does not work. The first drawback is that this assumption simply is counterfactual. One need look no farther than the Grateful Dead, year in and year out the most successful touring band in USA, for an example of an act that tours to massive crowds without receiving significant Top 40 airplay. The "Concert Pulse" section listing the top 50 concert acts of the past three months, in the June 6 issue of *Pollstar* includes numerous mainstream commercial acts (Rod Stewart, Moody Blues, Barry Manilow, Jethro Tull, Bob Dylan, the Ramones, and Richard Thompson) whose current live drawing power is not reflected in current airplay.

P O Box 5010 • Chapel Hill, NC 27514 • Phone 919-962-3397 • Fax 919-962-4453

The folk music world, moreover, consists of dozens upon dozens of touring artists who virtually live on the road playing for audiences of 25 to 500 in venues ranging from living rooms and church basements to stately medium sized theaters. Reports of the vast majority of the these concerts never appear in commercially oriented publications such as *Pollstar*, so the following data for folk artists from its June 6 number for the mere tip of the folk iceberg:

ARTIST	LOCATION	ATTENDANCE	GROSS
Jerry Jeff Walker	Austin, TX	2152	$32,280
Bruce Cockburn	Sacramento, CA	857	$16,802
Michelle Shocked	Pittsburgh, PA	596	$10,156
Arlo Guthrie	Austin, TX	689	$9474
Livingston Taylor	Ogunquit, ME	332	$6640
Taj Mahal	Providence, RI	568	$6266
Celtic Fiddle Festival	Arvada, CO	456	$6159
Ali Farka Toure	Seattle, WA	333	$5634
Altan	Denver, CO	339	$4509
Greg Brown	Denver, CO	325	$3998
The Story	Columbus, OH	334	$3410
Jesse Colin Young	Denver, CO	228	$3289
Tish Hinojosa	Seattle, WA	216	$2700
Townes van Zandt	Seattle, WA	257	$2692
Ferron	Ogunquit, ME	209	$2613
The Roches	Providence, RI	185	$2331
Pat Donohue	Denver, CO	188	$2135
Bill Morrissey	San Francisco, CA	161	$1771
Bill Morrissey	Columbus, OH	145	$1478
Blood Oranges	Burlington, VT	120	$466

Further bear in mind that during warm weather, much folk music activity occurs at outdoor folk festivals. Some, such as the Philadelphia Folk Festival and the Merle Watson Memorial Festival, draw upwards of 25,000 people. More than 500 other festivals in the USA draw anywhere from a few hundred to several thousand people each annually. All this is to suggest that folk artists are drawing people to venues and events that contribute significant amounts to ASCAP and BMI, yet the composers and publishers of the material they perform are not receiving concomitant payments from the agencies.

As expressed above, the very nature of radio sampling, rather than live performance sampling, leads to this result. The sampling methods further skew the results since they focus on commercial, weekday, daytime airplay. The vast majority of airplay for folk performers, both traditional and contemporary, occurs at nights and on weekends on several hundred public and community radio stations, as well as a few, often smaller,

commercial stations. Even folk material, therefore, which receives considerable airplay ends up being underreported by the systems currently in use.

As alluded to above, performance rights agencies in other countries address this situation by permitting presenters to submit affidavits attesting to the actual songs performed live for credit to the composers and publishers. Efforts to log live performance only at major venues would simply skew the logging system even further to the disadvantage of folk composers and publishers.

Widespread knowledge of these inequities produces several deleterious effects on the collection side. Particularly it encourages many otherwise law abiding presenters and presenting organizations to flout the copyright laws of these United States. This costs the performing rights agencies untold thousands of dollars in fees, which hurts all composers and publishers. The situation also forces the performing rights agencies to devote large scale resources, which otherwise could be paid out their members, in enforcement efforts. These efforts all too often turn into public relations nightmares for ASCAP and BMI, while alienating presenters. As a result, presenters resolve to violate the law, under pay the agencies, or go out of business altogether.

The latter course has cost the folk community at least several dozen venues in recent years. This has proven an especial problem with a certain class of smaller, community-based grassroots music events. These include public jam sessions, where amateur musicians make music together and are not paid to perform, and open mike events, where emerging singer/songwriters perform for little or no compensation for the exposure and experience. Also negatively impacted have been restaurants which include live music for little or no direct income and volunteer run coffeehouses which present emerging artists for very small audiences charging only tips or a very modest cover charge designed just to cover costs. At present, the only three loopholes exist: 1) events where the presenter is a 501(c)3 agency, the performers are not paid, and no real or implied admission is charged; 2) those where 100% original material is performed and the composers waive their live performance rights; and 3) events where 100% public domain material is performed. Yet these sorts of grassroots events nurture the next generation of composers.

The complexity of the rate schedules and reporting forms serves to compound these problems. Oddly, here at The Folk Alliance we have often experienced difficulty in obtaining, particularly from BMI, the reporting forms we need to calculate how much we owe and to make payment to the performing rights agencies. We have heard voluminous anecdotal reports of field representatives of the performing rights agencies providing presenters with misleading or inaccurate information or even inappropriately threatening presenters.

All these problems have solutions. These solutions, moreover, will work to the benefit of everyone involved. We can, by working together in good faith, increase dramatically compliance with the copyright laws and payments to the performance rights agencies, while moving toward a much more equitable system of distributions which more accurately reflects the reality of public performance of copyrighted music in the United States. This can be achieved by the following steps:

1. Large scale expansion of radio surveying to include dramatically more non-commercial stations and weekend and night time programming.

2. Establishment of a system for sampling live performance. Although permitting open submissions of affidavits from presenters or composers as in other nations would be ideal, it does pose many difficulties. These logistical problems can be surmounted by a sampling system, provided that the system sampled all forms of live presentation from which the agencies expect to receive fees. The sample should be distributed proportionally to the numbers of the types of venues from which fees are collected, rather than proportional to the fees generated by each type. Sampling by the latter means or only of the larger sorts of presenters would serve only to increase the current unrepresentativeness of the system. Obviously it will not be inexpensive or easy to create such a live performance sampling system, but its creation will produce more than offsetting revenue for the performing rights agencies. Once the inequities are removed from the system, presenters will have no moral high ground from which to justify their non-compliance.

FOLK ALLIANCE
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If they know that the fees will benefit the composers and publishers of the music they actually present, folk presenters will pay. ASCAP and BMI then will realize additional savings by reducing enforcement efforts. Folk composers and songwriters, many of whom currently do little or nothing to encourage compliance, will act in their own self-interest by insisting that folk presenters pay the agencies.

3. Creation of dial-in electronic databases of licensed material so that presenters can determine whether they have presented licensed material and, if so, licensed by which agency.

4. Generation of simplified reporting forms and, particular, rate tables and formula so that presenters can quickly and easily determine how much they owe.

5. Creation of special, lower rate class for non-revenue generating live and recorded performance of music. This class would include events and venues where no admission fee is charged or at most a small fee to cover no more than the actual cost of the musical presentation. This would be unrelated to the presenter's tax classification. This will answer the concerns of public jam sessions, open mikes, incidental music, and the like.

6. Creation of a special, lower rate class for educational presentation of live and recorded music, particularly in non-traditional teaching venues such as residential music camps and workshops.

These are solid steps towards a win-win situation for both the folk music community and the performing rights agencies.

Sincerely,

Art Menius
Manager

P O Box 5010 • Chapel Hill, NC 27514 • Phone 919-962-3397 • Fax 919-962-4453

Don Haynie
R.R. One, Box 298
High Falls, New York 12440
(914) 687-7364

Hon. Rep. William J. Hughes
207 Cannon Bldg.
Wash. DC 20515

STATEMENT FOR THE RECORD ON MUSIC LICENSING

Dear Rep. Hughes:

I am writing to you because I have heard that Congress is reviewing the licensing of musical compositions, and I would like you to be aware of some significant problems with the current system as administered by BMI and ASCAP. As a songwriter who earns a living performing my own compositions, I have been impacted in a few different ways by this system, and have first-hand experience of the problems and inequities in it. I should say at the beginning that I am of course in favor of composers being paid for the performance of their works; the problems arise in attempting to devise a system which will do this fairly; the current system does not.

There are problems in both of the major areas that ASCAP and BMI deal with: collection of licensing fees; and tracking performances of works to determine payments to composers. As these problems are very interrelated, it's hard to discuss them separately, as you'll see.

BMI and ASCAP collect fees from a huge variety of sources (more than I could list) including radio and TV stations, live music performance venues, and businesses that use recorded music in various ways. Then they keep track of music performed by a few "randomly selected" media outlets (almost exclusively major commercial radio and TV stations) and based upon these selected performances, they distribute payments to composers. This system probably compensates those who compose the most popular, mainstream music pretty accurately, and perhaps when the system was instituted many years ago it was adequate; but it has failed completely to keep pace with the growth in music markets outside (or besides) the mainstream. The inequities I've faced personally will illustrate this.

I perform my own compositions in small music venues -- cafés, concert halls that seat a few hundred, etc. I also have several recordings of my songs that are played on various kinds of radio stations -- NPR affiliates, and community listener-sponsored stations primarily. BMI and ASCAP make extremely diligent efforts (sometimes politely) to collect their licensing fees from the music venues where I perform, yet in over seven years of having my music played on a multitude of radio stations around the U.S., BMI (of which I'm a member) has logged the performance of only one song of mine! This tells me the system doesn't work: That they can be so diligent in collecting fees from the smallest café, yet not be able to monitor radio airplay on stations that broadcast to major cities. My songs have been played on radio stations in most of the major metropolitan areas: New York, Chicago, Los Angeles, etc.; and while this fact somehow escapes the notice of BMI's monitoring system, they do manage to notice the little forty-seat cafés (in the smallest of towns) that try to present writer-performers like myself. And when they

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find such a venue, they get on them like a pit-bull, threatening lawsuits, and applying fee-setting practices that are inflexible, and usually inappropriate. This has often resulted in venues giving up presenting live music at all, which has an obvious negative impact on my livelihood. (I feel compelled to note here that among the music presenters that I have discussed this with, ASCAP has the worse reputation of the two, and that's why I chose BMI to affiliate with. But neither of them is really doing the job right.)

There are two fronts on which the problems can be approached. One is to work for more fairness and flexibility in the area of fee collection, perhaps basing fees on the actual percentage of music performed at a venue that is not performed by its own composer; some allowances need to be made based on the actual income a venue receives from the performance of music; and allowances must be made for non-profit, volunteer-run venues. At present there is no flexibility in their policies. Both BMI and ASCAP claim to want to support fledgling composers, yet these small venues, where songwriters can expose their work to the public, are being strangled by these organizations' policies!

The second front is in the area of determining what music is being played (by broadcast media, and at the venues). ASCAP and BMI have to update their monitoring methods to more accurately keep track of the diversity of today's culture -- and tomorrow's. As more music outlets come into being (information superhighway? 500 cable channels?) these huge organizations have to put as much of their resources into "tracking" music performed on smaller outlets as they put into "tracking down" little cafés where a songwriter can be heard. They must not be allowed to continue to work on the assumption that all the music played by smaller broadcast media, and at live music venues, is represented somehow by their monitoring of the biggest commercial outlets.

These changes have to be made to bring fairness back into a system that was originally based on a good idea: that originators of songs and other intellectual property deserve fair compensation for its use. And these changes have to be initiated through appropriate legislation, because as the record shows, ASCAP and BMI will not change these practices on their own. As a last note, I strongly recommend you investigate the systems used by the European performing rights organizations. I'm not an expert on this, but I have talked to a composer from Europe, and apparently their methods of registering performances of their works are much more accurate and equitable.

Thank you very much for your attention to this matter, a long-standing injustice that affects the culture and economy of this country to a greater degree than a first glance might show.

Sincerely,

Don Haynie

Don Haynie

copies to:

Rep. William J. Hughes
Rep. Carlos Moorehead
Rep. Maurice Hinchey
Sen. Daniel P. Moynihan
Sen. Alfonse D'Amato
Frances Preston, President of BMI
Marilyn Bergman, President of ASCAP

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